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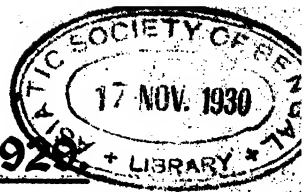
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Tagore Law Lectures—1928

THE LAW OF INSOLVENCY

IN

BRITISH INDIA

BY

SIR DINSHAH FARDUNJI MULLA, Kt.,

ADVOCATE, HIGH COURT, BOMBAY.

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PUBLISHERS' NOTE.

THE Lectures are arranged (except in a few cases) in the order of sections, and the subject-matter of the Lectures is divided into paragraphs.

Each Lecture deals with a group of sections, and the paragraphs constitute commentaries on the sections, the arrangement being the same as in Mulla's Code of Civil Procedure.

The texts of both the Acts amended up to date are printed at the end of the Lectures, and below each section reference is given to the paragraphs of the Lectures which constitute the commentary on that section.

The text of the Provincial Insolvency Act, the Rules made under that Act, and the General Index to the Act will be found in the portion coloured red. This is followed by the text of the Presidency-towns Insolvency Act, the Rules made under that Act and the General Index to the Act.

The cases have been brought up to April 1930.

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PREFACE.

IN India there are two systems of Insolvency Law, the one represented by the Presidency-towns Insolvency Act, 1909, and the other represented by the Provincial Insolvency Act, 1920, which replaced the Act of 1907. There are five main points of difference between the two Acts, namely, the constitution of Courts, the procedure to be followed from the date of the presentation of the petition to the date of the order of adjudication, the person in whom the debtor's property is to be vested, the doctrine of relation back, and the machinery for investigating the debtor's conduct.

Great credit is due to the framers of the Provincial Insolvency Act, 1907, which was the first codification of the insolvency law in British India outside the presidency towns. The defects which were discovered in the working of the Act were remedied by the Act of 1920. Conditions, however, have considerably changed since 1920. The number of insolvencies has largely increased, and the subordinate Courts are called upon to decide complicated questions of insolvency law similar to those which arise under the Presidency-towns Insolvency Act. The result is that the provisions of the Act have been found inadequate in many cases, and they require enlarging and recasting.

There have been strong complaints against the dilatory way in which the law of insolvency is administered outside the presidency towns. This is due chiefly to the procedure prescribed by the Provincial Insolvency Act, 1920, to be followed at the hearing of the petition. Under sec. 24 of that Act the debtor is to be examined, if he is present, before an order of adjudication is made. This examination corresponds to the public examination of the debtor under the Presidency-towns Insolvency Act. Under both Acts the debtor is examined as to his conduct, dealings and property. Under the Presidency-towns Insolvency Act the examination is held after the order of adjudication has been made. Under the Provincial Insolvency Act it is held before adjudication. It was at one time thought that the object of the examination under that Act was to enable the Court to decide whether an order of adjudication should be made, but the Privy Council has made it clear that it is

not so. It has been laid down by that tribunal in explicit terms that misconduct on the part of the debtor, if any such is disclosed at such examination, is not a ground upon which an order of adjudication can be refused ; it is to be dealt with upon the debtor's application for his discharge. It is, therefore, difficult to understand why the debtor's examination under the Provincial Insolvency Act is required to be held before adjudication. The examination drags on at inordinate length and several months elapse before an order of adjudication is made. It was this dilatoriness which brought into prominence the question as to the terminus a quo for calculating the period of two years mentioned in sec. 53 of the Provincial Insolvency Act. That section provides that a transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent *on a petition presented* within two years after the date of the transfer, be voidable as against the Receiver and may be annulled by the Court. The words italicised above were inserted in the section by sec. 6 of the Insolvency Law (Amendment) Act, 1930. Before the amendment of the section the question arose whether if a voluntary transfer was executed within two years before the presentation of the petition but more than two years before the order of adjudication, the transfer could be avoided under that section. There was a conflict of decisions on this question which led to the amendment referred to above. Under the amended section the transfer may be avoided if the transfer was executed within two years before the presentation of the petition, though it may be more than two years before the order of adjudication. The question would never have arisen had it not been for the long period which usually elapses between the presentation of the petition and the order of adjudication. This defect still remains to be remedied.

On the making of an order of adjudication the proceedings in insolvency assume a new phase. Until adjudication the proceedings are between the debtor and the petitioning creditor. The Court is not called upon in those proceedings to decide questions other than those arising between the debtor and the petitioning creditor. On the making of an order of adjudication the State comes on the scene as represented by

the Official Assignee. Thenceforth all proceedings come under the control of the Insolvency Court. The Official Assignee is the guardian not only of the interest of the particular creditors of a particular debtor, but also of public morality and the interest which every member of the public has in the observance of commercial morality. This guardianship the Official Assignee exercises under the control of the Court. If an application is made by the insolvent for approving a composition or a scheme of arrangement, or for his discharge, the Court will not approve it or grant an order of discharge, although all the creditors consent, without regard to the interests of the public. It will consider, not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large (a).

I have made several suggestions for amending both Acts. Some of them which are of primary importance are mentioned in Lecture I and the rest in other Lectures. But, as I have stated elsewhere, no amount of legislation can do any substantial good unless a change is made in what may be called the subsidiary machinery for the administration of the insolvency law in India. It is often said that creditors in this country are apathetic and that they do not assist the Official Assignee or Receiver in bringing the misconduct of the debtor to the notice of the Court. This, however, is also the case in England as appears from reported cases. In both countries where the assets are almost nil the creditors write off their debts and take no further action. In England, however, there are two officers, one the Official Receiver and the other the trustee in bankruptcy. The duties of the Official Receiver relate both to the administration of the debtor's estate and to the investigation of the conduct of the debtor. As regards the debtor's conduct, it is the duty of the Official Receiver to investigate it, to take part in the public examination and to report to the Court upon his conduct. The duty of the trustee in bankruptcy is to realize the property of the bankrupt and distribute it amongst the creditors. In India the Official Assignee combines in himself to a large extent the powers and duties both of the Official Receiver and trustee in bankruptcy.

(a) *Re Hester* (1889) 22 Q. B. D. 632, 639; *Re Flatau* (1893) 2 Q. B. 219.

He has not only to investigate the conduct of the insolvent and to report to the Court upon it, but also to realise the assets of the insolvent and to distribute them amongst the creditors.

The most important function to be performed by an officer in insolvency is to investigate the conduct of the insolvent. Unless this is done satisfactorily and the misconduct of the insolvent is brought to the notice of the Court by a responsible officer, the whole machinery of the insolvency law will continue as it now is—a machinery to enable the debtor to obtain a discharge from his debts however reckless and fraudulent his conduct may have been. It is no punishment to a dishonest debtor merely to suspend his discharge. Having regard to the large amount of work which the Official Assignees and Deputy Official Assignees in India have to do, they cannot be expected to make such a full and exhaustive investigation into the conduct of the insolvent as would be done by an officer whose sole duty it is to make such investigation. In the presidency towns this can best be done by attaching a permanent solicitor and a permanent barrister to each High Court. Their sole duty should be to concentrate on the investigation of the debtors' conduct and affairs and to bring their misconduct to the notice of the Court with special reference to the provisions of the Acts which deal with bankruptcy offences. Bankruptcy offences, it must be remembered, are as much offences against the State as those mentioned in the Indian Penal Code. These offences broadly fall into two classes, namely, fraudulent concealment or disposition of property and keeping false books. And yet so far as Bombay is concerned there is not a single expert accountant in the office of the Official Assignee to examine the insolvent's books. This is left to the creditors, and the State does not seem to concern itself with it. Prosecutions for bankruptcy offences in this country are very rare, not because insolvencies are due to misfortune, but because there is no expert accountant to examine the debtor's books and no officer who could devote his full time to the investigation of the debtor's conduct. Conditions in the mofussil are much worse. There a Receiver is appointed as occasion arises. Generally he is a pleader and he has his own professional work to do. A Receiver under the Provincial Insolvency Act is a mere collector of assets, and he has neither the right nor the means to intervene. The

Act nowhere imposes any duty upon him to investigate the conduct of the insolvent or to report to the Court upon it, although the Court may require him to make a report and may take such report into consideration under section 38 (4) or section 42 (2) of the Act. But the investigation cannot always be exhaustive if the Receiver is a busy practitioner. Unless some reform is made in the administration of the insolvency law, the Insolvency Court will continue to be a place of pilgrimage for debtors to enter at one door with offerings of debts for the god presiding in it, and to depart at the other door, discharged from all their debts and all their sins.

I acknowledge gratefully the valuable assistance rendered by K. S. Shavaksha, Esquire, Barrister-at-law, Middle Temple, and by Sir Lancelot Graham, K.C.I.E., I.C.S., Barrister-at-law, Middle Temple, in preparing the Lectures.

I have also to express my obligations to K. J. Khambata, Esquire, Advocate (O.S.), B. P. Sethna, Esquire, Advocate (O.S.), N. B. Abuvala, Esquire, Attorney-at-law and Deputy Official Assignee, Bombay, M. R. Vakeel, Esquire, Attorney-at-law, and B. D. Mehta, Esquire, Advocate (A.S.), for assisting me in various ways, to the Registrars of the High Courts for furnishing me with copies of Rules made under the Acts, and to the Times of India Press, Bombay, for the great care and remarkable despatch in printing the work.

D. F. M.

CHAMBERS No. 17,
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19th August 1930.

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ADDENDA ET CORRIGENDA.

- P. 32, f. n. (d), l. 4.—*Add after 667 the following : 115 I. C. 39, ('28) A.C. 786.*
- P. 48, f. n. (k), l. 1.—*Add " Re Holland (1902) 2 Ch. 360, 379.*
- P. 54, f. n. (d), l. 1.—*Substitute " Bansidhar " for " Ransidhar."*
- P. 54, f. n. (d), ll. 2-3.—*Substitute " Ghani Muhammad v. Dina Nath Puri " for " Re Ghani Muhammad."*
- P. 56, para. 74—*Add as a new para. :—*
 The Insolvency Court has power to restrain by injunction interference with its
 its own officer. Thus it may restrain a person from interfering with the Official
 Assignee or Receiver in carrying out his duties or with the possession of the
 Official Assignee or Receiver : *Ex parte Cochrane* (1875) 20 Eq. 282 ; *Helmores v.*
Smith (2) (1887) 35 Ch. 449.
- P. 57, l. 19.—*Add the following as a separate para. :—*
 79A. *Application of O. 21 of the Code of Civil Procedure, 1908.*—The provisions of
 O. 21 of the Code of Civil Procedure, 1908, relating to sales in execution of decrees
 and to resistance to delivery of possession to the execution-purchaser do not apply
 to sales by the Receiver : see para. 690.
- P. 72, f. n. (e), l. 2.—*Add 119 I. C. 735.*
- P. 89, l. 30.—*Add the following after " insolvency " :—*
 Sec. 56 of the Presidency-towns Insolvency Act [Provincial Insolvency Act, sec. 54]
 relates to *transactions* by way of fraudulent preference including transfers by way
 of fraudulent preference. The clause now under consideration is confined to
transfers by way of fraudulent preference.
- P. 94, f. n. (r), l. 7.—*Add 121 I. C. 812.*
- P. 96, f. n. (j2), l. 4.—*Add 112 I. C. 646.*
- P. 99, l. 22.—For the words " as an act of insolvency under cl. (a) " *substitute " as a*
notice of suspension of payment under cl. (g)."
- P. 117, f. n. (b), l. 2.—*Add (1878) 39 L. T. 361.*
- P. 117, f. n. (x), l. 3.—*Add (1878) 48 L. J. (Bank.) 43.*
- P. 129, f. n. (g)² l. 2.—*Substitute " Douche " for " Duché."*
- P. 130, l. 2.—*Add at the end :—*
 See para. 788, " Appeal against order of adjudication," p. 529 below.
- P. 143, f. n. (t1), l. 2.—*Add ('30) A.L. 227.*
- P. 151, f. n. (b), l. 8.—*Add 122 I. C. 351, ('30) A.M. 278.*
- P. 151, f. n. (c1), l. 2.—*Add 88 I. C. 70 ('25) A. P. 355.*
- P. 152, f. n. (d), l. 8.—*After 666 add 122 I. C. 351, ('30) A.M. 278.*
- P. 152, f. n. (f), l. 1.—*Substitute " Puthen " for " Puthan."*
- P. 155, f. n. (l1), l. 1.—*After " Chettyar " add (1929) 7 Rang. 785.*
- P. 168, f. n. (g), l. 2.—*Substitute 353 for 355.*

- P. 170, f. n. (n), l. 2.—*Substitute* 353 for 355.
- P. 180, f. n. (f), l. 5.—*After* 135 *add* 118 I. C. 791.
- P. 181, f. n. (l), l. 1.—*Substitute* "Mulchand" for "Malchand."
- P. 183, f. n. (b), l. 9.—*After* 1199 *add* 122 I. C. 857, ('30) A.B. 11.
- P. 186, l. 21.—*Substitute* "High" for "Insolvency."
- P. 187, f. n. (d1).—*Add* 120 I. C. 735.
- P. 187, f. n. (y), l. 2.—*Substitute* (1929) 56 Cal. 712, 714, 719 for (1928) 48 Cal. L. J. 298, 300, 304.
- P. 191, l. 29.—*Substitute* "certificate" for "discharge."
- P. 193, f. n. (b), l. 6.—*After* 135 *add* 118 I. C. 791.
- P. 205, f. n. (s), l. 2.—*Substitute* "Sarat Kumar" for "Sailendra Krishna Roy," and in lines 3 and 4 *substitute* 56 Cal. 667 for 33 C.W.N. 21 and in line 4 *add* 115 I. C. 39.
- P. 206, f. n. (p1), l. 2.—*Add* 121 I. C. 772, ('30) A.R. 32.
- P. 225, f. n. (k), l. 7.—*Add* ('30) A. M. 112.
- P. 234, f. n. (y), l. 2.—*Add* 122 I. C. 351, ('30) A. M. 278.
- P. 235, f. n. (a), l. 2.—*After* 652 *add* 122 I. C. 351, ('30) A.M. 278.
- P. 236, f. n. (h), l. 2.—*After* 653 *add* 122 I. C. 351, ('30) A.M. 278.
- P. 240, l. 14.—*Add after* "plaintiff" :—If during the pendency of an appeal the appellant is adjudged insolvent, but the adjudication is annulled before the Official Assignee or Receiver comes to know about the appeal, the insolvent is entitled to prosecute the appeal : *Ramchandra v. Shripati* (1929) 31 Bom. L.R. 357, 118 I.C. 252, ('29) A.B. 202.
- P. 250, f. n. (r), l. 5.—*Add* 122 I. C. 351, ('30) A.M. 278.
- P. 254, f. n. (p), l. 6.—*After* "Ghanshamdas" *add* (1929) 120 I. C. 84.
- P. 267, f. n. (t), ll. 2-3.—*After* ('29) A. A. 843 *delete* "Suraj Pal v. Shib Lal (1930)." c
- P. 281, f. n. (c), l. 3.—*Add at the end* 117 I.C. 582.
- P. 299, f. n. (p), l. 3.—*Add* 119 I. C. 189.
- P. 301, f. n. (a), l. 3.—*Add* 119 I. C. 189.
- P. 307, f. n. (f), l. 7.—*After* 514 *add* 120 I. C. 702, ('30) A.R. 20 and 47.
- P. 319, f. n. (r), l. 3.—*Substitute* 52 Mad. 919, 121 I.C. 603, ('30) A.M. 24 for 57 Mad. L. J. 99.
- P. 333, f. n. (d1), l. 2.—*Add* 121 I. C. 745, ('30) A.C. 171.
- P. 350, l. 34.—*Add the following after* "(s)" :—In a Bombay case under the Provincial Insolvency Act [*Shripad v. Basappa* (1925) 49 Bom. 785, 89 I.C. 996, ('25) A.B. 416], MacLeod, C. J., expressed the opinion that such power does not vest in the Official Assignee or Receiver. This view, it is submitted, is incorrect.
- P. 359.—*Add the following as a new para. :—*
 527A. *Official Assignee bound by insolvent's admissions.*—Admissions by the insolvent before insolvency, which would be evidence against him, are admissible against the Official Assignee or Receiver, where the Official Assignee or the Receiver has no higher title than the insolvent; in such cases the Official Assignee or Receiver is estopped where the insolvent himself would be estopped. This, however, does not apply where the Official Assignee or Receiver by virtue of his higher title attacks the transaction itself; in such cases recitals and statements in a deed are not evidence against the Official Assignee or Receiver attacking the transaction under sec. 55 of the Presidency-towns Insolvency Act (Provincial Insolvency Act, sec. 53) or under sec. 53 of the Transfer of Property Act, 1882. Dealing with this question Stirling, L.J., said in *Re Holland* (1902) 2 Ch. 360, as follows :—"Now where the trustee in bankruptcy on behalf of the creditors

of the bankrupt claims to treat the deed as void under the Statute of Elizabeth (13 Eliz. c. 5), he is asserting a right which the bankrupt could never have set up, and he is not identified in interest with the bankrupt; and consequently the recitals and statements in the deed are not admissible against him, though they are admissible against the trustees of the deed, whose interest is the same as that of the bankrupt. On the other hand when the trustee resists specific performance of the covenants contained in the deed on the ground that it is voluntary, he is setting up a defence which would have been available to the bankrupt himself, and is identified in interest with him; and the recitals and statements in the deed are admissible as against him, though the weight to be attached to them must depend on the circumstances of the case. The distinction just stated is recognised by the Master of the Rolls (Sir Thomas Plumer) in *Battersbee v. Farington*, 1 Swans. 106, and appears to have been taken by Bramwell B. in *Harris v. Rickett* (1869) 4 H. & N. 1, 6."

P. 387, para. 551.—Transfer to para. 562 as second para. thereof.

P. 396, f. n. (e), l. 1.—Substitute (1875) 10 I. R. Eq. 117, 129 for 10. I.R. Eq. 129.

P. 399, f. n. (p), l. 3.—Add 121 I. C. 745, ('30) A.C. 171.

P. 418, para. 591, l. 28.—Substitute "proviso to sec. 51" for "sub-sec. (2)."

P. 424, f. n. (y1), l. 2.—Add 38 I. C. 481.

P. 432, f. n. (l), ll. 5-6.—Substitute "*Ananthanaryana Ayyar v. Sankurnaryana Ayyar*" for "*Ananthanaryanna Ayyar v. Sankarnarayanna*."

P. 441, f. n. (n).—Substitute "2 Ch. 515" for "B. & C. R. 143, 158."

P. 444, f. n. (c), ll. 2-3.—Substitute "2 Ch. 515," for "B. & C. R. 143, 159."

P. 445, f. n. (l).—Substitute "2 Ch. 515," for "B. & C. R. 143."

P. 446, f. n. (r), l. 1.—Substitute "2 Ch. 515," for "B. & C. R. 143, 149."

P. 447, f. n. (z), l. 1.—Substitute "L. R. 12" for "712."

P. 449, f. n. (l), l. 7.—After 471 add 119 I. C. 708.

P. 472, l. 12.—Substitute "proof" for "disclaimer."

P. 480, l. 25.—Add the following after "(c1)":—

Nor the provisions of O. 21, r. 66 [*Ramchand v. Shop Mohra Shah* (1929) 11 Lah.

L.J. 198, 119 I.C. 427, ('29) A.L. 622] or of O. 21, r. 71 [*Cheda Lal v. Lachman Prasad* (1917) 39 All. 267, 37 I. C. 830].

P. 488, f. n. (x), l. 4.—Add 122 I. C. 857, ('30) A.B. 11.

P. 500, l. 22.—Substitute "secs. 22 and 28 (1)" for "sec. 22."

P. 500, l. 27.—Add "or sec. 28 (1)" after "sec. 22."

P. 519, f. n. (v), l. 1.—Substitute "Receiver" for "Assignee."

LECTURE I.

ORIGIN AND HISTORY OF BANKRUPTCY LAW.

Paras
1, 2

1. **Object of the law of bankruptcy.**—"The chief aim of every system of Bankrupt Law should be to combine and regulate two great objects:—1st, The distribution of the effects of the debtor in the most expeditious, the most equal, and the most economical mode; and 2ndly, the liberation of his person from the demands of his creditors when he has made a full surrender of his property" (a). Writing about bankruptcy law as it was in his days, Blackstone says (b): "He [bankrupt] was formerly considered merely in the light of a criminal or offender; . . . but at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors." The earlier bankruptcy law was a species of criminal law, and bankrupts under that law were regarded as criminal offenders. The treatment to which they were subjected was cruel and inhuman. The present bankruptcy laws are far more humane than what they were in the days of Blackstone.

2. **Hindu law and debtors.**—There was no machinery in the indigenous systems of law providing for the property of a debtor being seized for the benefit of his creditors and divided rateably amongst them. Individual creditors were left to pursue their remedies against the debtor according to rules made by each community for the recovery of debts. The Hindu law, though it had attained considerable perfection in the days especially of the later Smritis, contains no indication of anything approaching a system of bankruptcy. There was trade and commerce in those days, and the later Smritis contain rules regulating the sale of goods almost similar to those in the Indian Contract Act, 1872. They also contain rules as to partnerships

(a) Henley's Bankrupt Law, 3rd ed., p. 1.

(b) Blackstone's Commentaries, vol. 2, pp. 471, 472.

**Paras.
2, 3**

and even associations and companies (c), but there is no trace anywhere of the procedure known to the Roman law as *cessio bonorum*. There were rules, however, for the recovery of debts, and they are contained in Manu Samhita (d). They are as follows :—

“ If a creditor makes an allegation against a debtor for the recovery of his money, the king, after the debt has been proved, shall cause such money to be realized from the debtor, and make it over to the creditor. By those means, by which the creditor can realize the amount of claim from the debtor, the king shall cause it to be realised from the debtor and make it over to the creditor. By means of friendly persuasion, by getting its payment assured by a bond or oath, . . . by arresting the person of his son, or by employing force, . . . a creditor can realise the money from his debtor. He, who will thus realise his money from his creditor, must not be indicted by the king for his having realised the same.”

3. Roman law and debtors.—In its treatment of debtors the earlier Roman Law was nothing short of barbarous. In the earliest period of that law no process existed by which a creditor could go against the property of his debtor for the satisfaction of his debt. The property of a Roman was held inviolable. The only remedy of a creditor whose debt was admitted or who had obtained a judgment upon his debt, was to levy execution against the debtor's person. If the debtor did not pay within a specified time, the creditors were at liberty to cut the debtor's body into pieces, each of them taking his proportionate share ; and “ no creditor who cut too little or too much could be called therefor to account.” At a later period in the history of the Roman law, a procedure was introduced whereby the whole of the property of the debtor could be seized and sold. This procedure was applicable only in four cases, (i) where the debt was admitted, (ii) where judgment had been obtained on a debt, (iii) where the debtor had absconded, (iv) where he had secreted himself in order to defraud his creditors. In any of these cases the debtor's property could be seized and sold for the benefit of the creditors. The sale released the debtor from all liability in respect of past debts except those which were contracted by fraud. In about 48 B.C. another form of procedure was introduced known as *cessio bonorum*, which enabled a debtor to become a bankrupt on his own petition by surrendering the whole of his property to his creditors. On the surrender being made the debtor was relieved from liability for arrest and imprisonment, but his after-acquired property remained liable for the payment of his debts except that he was allowed out of such property a certain portion for his subsistence. The earlier bankruptcy statutes of England are founded to some extent upon the Roman law.

4. Common law and debtors.—While the early Roman law did not know of any process whereby execution could be issued against the property of a debtor, the common law of England did not know of any process whereby a man could pledge his person for payment of a debt. The necessity, however, of a process of execution against the person of a debtor and detaining him in prison until he paid his debt, was soon felt, and the writ of *capias ad respondendum* (e) was employed for the arrest and imprisonment of debtors. This mode of execution became very popular and was resorted to by creditors in almost every case. No distinction was drawn between honest and unfortunate debtors on the one hand and dishonest debtors on the other. Whether the inability to pay arose from misfortune or was brought about by recklessness or fraud, they were all committed to prison to remain there at the mercy of their creditors until the debt was paid. A debtor who had no means of his own had to rely on the charity of friends if he was not to die of starvation in prison. This is what a Chief Justice of England said in the year 1551 in the course of a judgment in a sheriff's action (f); "If one be in execution he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle and puts them in a pound, for there the owner of the cattle ought to give them meat, and not he that distrained them, no more is the party or the sheriff, who has one in execution, bound to give meat to the prisoner, but he ought to live of his own goods, although he be in for felony, until he be attained, and this by the course of the common law. For before attainder the goods are his, and in his hands, and the common law in this point is confirmed by a statute; and if he has no goods, he shall live of the charity of others, and if others will give him nothing, let him die in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment." Just about this time the Legislature had intervened. There were two sets of legislation, one directed against the tyranny of creditors and the hardships of the gaol, and the other directed against dishonest and fraudulent debtors. The laws against fraudulent debtors were what were called in those days the bankrupt laws. The whole law of bankrupts was an innovation grafted on the common law (g). There was considerable controversy about this time as to the merits and demerits of statute law. It is as well to note the existence of this controversy in passing.

(e) Literally, that you take to answer. The writ was extended to debts, detainee and replevin by the statute 25 Edw. 3, c. 17. The statute is in these terms: "Item, and it is accorded that such process shall be made in a writ of debt and detainee of chattels and taking of beasts, by writ of *Capias*, and by

process of exigent (literally that you cause to be taken) by the sheriff's return, as is used in a writ of account (account)."

(f) Per Mountague, C. J., in *Dive v. Maningham* (1551) 1 Pl. Com. 60, 68, 75 E. R. 99, 108-109.

(g) Blackstone, 15th ed., vol. II, p. 479.

Paras.
5, 6

5. **Common law.**—Almost the whole of the English law at this period consisted of the common law. Writing about it, a great jurist says : “ That ancient collection of unwritten maxims and customs, which is called the common law, however compounded, or from whatever fountains derived, had subsisted immemorially in this kingdom ; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages ; it was then taught, says Mr. Seldon, in the monasteries, in the universities, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus* (h), is the character given to them soon after the conquest by William of Malmsbury. The judges therefore were usually created out of the sacred order, as was likewise the case among the Normans ; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day ” (i).

6. **Statute law.**—The whole foundation of the English law rested upon the common law. Lord Coke, known by his celebrated work, “ Coke on Littleton,” was a great admirer of the common law. “ To know,” he says “ what the common law was before the making of any statute, is the very lock and key to set open the windows of the statute ” (j). The earliest statute law was in some cases a modification of the common law and in some an extension of that law. Those statutes were drafted by men well versed in the common law, and they did not therefore provoke any serious opposition though the lawyers of those days were by temperament strongly opposed to the common law being tampered with by legislation. In course of time, however, laxity prevailed. The draftsmen were not competent and their knowledge of the common law was not profound. The result was that there was bitter criticism both of the statutes and their authors. It is said that once a statesman wanted to consult Lord Coke on a point of law, and the reply which he made to him was : “ If it be common law, I should be ashamed if I could not give you a ready answer ; but if it be statute law, I should be equally ashamed if I answer you immediately.” Writing about statute law he said : “ But if acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far

(h) Literally, no cleric (i.e., clergy) but
a lawyer.

(i) Blackstone, vol. I, pp.16-17.

(j) 2 Inst, 308.

forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do."

Paras.
6, 7

The criticism levelled against statute law grew more intense in course of time. In 1765 Blackstone, one of the greatest jurists of England, delivered lectures in the university of Oxford, now known as "Blackstone's Commentaries on the laws of England." This great jurist attributed the delays of law to statutes. This is what he says: "The mischiefs that have arisen to the public from inconsiderate alterations in our laws are too obvious to be called in question; and how far they have been owing to the defective education of our senators is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity changed for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other courts of justice), owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; overladen with provisoes and additions, and many times on a sudden penned or corrected by men of none, or very little judgment in law" (j1).

7. The first statute of bankruptcy.—The law of bankruptcy as stated above is an innovation on the common law. It is entirely a creature of statute. The first legislative provision on bankruptcy contained in the Statute Book of England was the statute 34 and 35 Hen. 8, c. 4, passed in the year 1542. By that statute the power of dealing with the bankrupt and his effects was vested in the Lord Chancellor and other high officers. The statute was directed entirely against fraudulent debtors. The preamble to the statute runs thus: "Where divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their duties, but at their own wills and pleasures consume debts and the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience." The Act is called "An Act against such persons as do make bankrupt," and it is directed against dishonest debtors "fleeing to parts unknown, or keeping their houses". Various derivations have been given of the word

Paras.
7, 8

"bankrupt". According to some it is derived from the Latin words "*bancus*," a table or counter of a tradesman, and "*ruptus*" broken, in allusion to the custom said to have prevailed in Italian cities during the Middle Ages of breaking the table of a defaulting tradesman. According to some it is derived from the French words "*banque*," counter, and "*route*," a track, signifying that the tradesman has removed his table or counter leaving but a trace behind. Referring to the title of the statute, Blackstone says: "It is observable that the title of the first English statute concerning this offence, 'against such persons as do make bankrupt,' is a literal translation of the French idiom, '*qui font banque route*'" (k). Lord Coke preferred the French derivation. He says: "We have fetched as well the name as the wickedness of bankrupts from foreign nations; for *banque* in the French is *mensa* and a *banquer*, or exchanger, is *mensarius*, and *route* is a sign or mark, as we say, a cart *route* is the sign or mark, where the cart hath gone; metaphorically, it is taken for him that hath wasted his estate, and removed his *banque*, so as there is left but a mention thereof. Some say it should be derived from *banque* and *rompue*, as he that hath broken his *banque* or state. In former times, as the name of a bankrupt, so was the offence itself (as hath been said) a stranger to an Englishman, who of all nations, was freest of bankruptcy. Neither do we find any complaint in parliament, or act of parliament made against any English bankrupt, until the 34th year of Hen. 8, when the English merchant had rioted in three kinds of costlinesses, *viz.*, costly building, costly diet, and costly apparel, accompanied with a neglect of his trade and servants, and thereby consumed his wealth."

It will be noticed that the two acts of bankruptcy mentioned in the statute are (1) fleeing to parts unknown and (2) keeping house not minding to pay creditors. The statute was not confined to traders. It applied both to traders and non-traders. It continued for about 28 years, and was completely altered by the next statute 13 Eliz. c. 7. As to the statute of Hen. 8, Lord Hardwicke observed: "The statute of Hen. 8th has been so much altered by subsequent Acts that it does not deserve any consideration; therefore laying that Act out of the case, I will begin with the 13 Eliz. cap. 7" (l).

8. 13 Eliz. c. 7.—The next statute of bankruptcy was 13 Eliz. c. 7, passed in 1570. That statute, after reciting that the class of persons against whom the statute of Hen. 8 was directed was increasing in great numbers and was likely to increase further, and that it was desirable to make a plain declaration as to who should be deemed to be a bankrupt, defines a bankrupt in the following terms: "If any merchant, or other person, using or

(k) Blackstone's Commentaries, Vol. 2, p. 472, f. n.

(l) *Bromley v. Goodere* (1743) 1 Atk. 75, 77, 26 E. R. 49, 50.

exercising the trade of merchandize, by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise in gross or by retail, or seeking his or her trade or living, by buying and selling, and being subject born of this realm, or any of the Queen's dominions, or denizen, sithence the first day of this present parliament, hath or at any time hereafter shall depart the realm, or begin to keep his or her house or houses, or otherwise to absent him or herself, or take sanctuary, or suffer him or herself willingly to be arrested for any debt or other thing not growing or due for money delivered, wares sold, or any other just or lawful course, or good consideration or purposes, hath or will suffer him or herself to be outlawed, or yield him or herself to prison, or depart from his or her dwelling house or houses, to the intent or purpose to defraud or hinder any of his or her creditors, being also a subject born, as is aforesaid, of the just debt or duty of such creditor or creditors, shall be reputed, deemed and taken for a bankrupt."

9. **Appointment of Commissioners.**—The statute of Elizabeth is the real foundation of the English law of bankruptcy. The statute of Henry VIII invested the Lord Chancellor and other high officers with power over the person and property of the bankrupt. By the statute of Elizabeth, the Lord Chancellor was empowered to appoint "such wise and honest discreet persons as to him shall deem good" to be commissioners with power to take such order as they should think fit with the body and property of bankrupts and to seize their property and distribute it rateably amongst the creditors. Under this statute the Lord Chancellor assumed to himself the power of superintendence over the proceedings under a commission, and there was no appeal from his decision. "The Chancellor's judgments in bankruptcy cannot be appealed from, because they are in general precisely like special cases in the courts of law, and where the jurisdiction is mentioned by the legislature, it is given to the chancellor and not to the court of chancery, and therefore in many cases in which he decides against a party, he gives him liberty to bring an action or to try the question by an issue or a special case, so that it may be decided by the courts of law. If it is an equitable question of importance, he gives leave to file a bill, which may, if necessary, be carried to the House of Lords" (m). There was also an appeal then from the decision of the Courts of law to a Court of Error and ultimately to the House of Lords.

10. **13 Eliz. c. 7 confined to traders only.**—The statute of Henry VIII was directed against all debtors whether traders or not. The statute of Elizabeth applied only to traders. This distinction between traders and non-traders continued up to 1861. The reason why bankruptcy

Paras.
10, 11

law was not extended to non-traders is thus stated by Blackstone: "But still they [the laws of England] are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual traders; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides; the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune, and not his fault. To the misfortunes therefore of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared, that no one shall be capable of being made a bankrupt, but only a trader; nor capable of receiving the full benefit of the statutes, but only an *industrious* trader" (n).

11. 21 Jac. 1, c. 19.—In 1623 another statute was passed being 21 Jac. 1, c. 19. That statute after reciting that the number of bankrupts was increasing every day and that "frauds and deceits were invented and practised for the avoiding and eluding the penalties of the good laws in that behalf already made and the remedy by them provided," declared that the laws made against bankrupts should be "in all things largely and beneficially construed and expounded for the aid, help and relief of the creditors". It was also provided by the same Act that unless it appeared to the commissioners that the inability of the bankrupt to pay his or her debts arose from some casual loss he or she should, upon conviction by indictment of such misconduct, be set upon the pillory in some public place for the space of two hours and have one of his or her ears nailed to the pillory and cut off.

12. 4 Ann. c. 17.—The policy of the bankruptcy law continued to be the same until the reign of Queen Anne. In 1705 a statute was passed being 4 Ann. c. 17, which enabled a bankrupt, if he surrendered all his property and otherwise conformed to the requirements of the bankruptcy law, to obtain an order of discharge called a "certificate of conformity." The certificate had to be confirmed by the Lord Chancellor. The effect of the certificate of conformity was to discharge the person of the bankrupt and his after-acquired property from all debts owing by him at the time of his bankruptcy. The debtor was no longer left to the mercy of his creditors and the law of bankruptcy assumed a new phase. At the same time it was provided that if a bankrupt wilfully omitted to surrender himself to the commissioners and to submit himself for examination or if after voluntarily surrendering himself omitted to make a full discovery of his property and to deliver it to the commissioners, he should suffer as "a felon without the benefit of clergy". This was the first statute which introduced the punishment of death for omitting to surrender to the commissioners or for concealing property. It was not until 1820 that the punishment of death was changed into one of transportation for life or for a term not less than seven years, or to imprisonment with or without hard labour for a term not exceeding seven years (o).

Para. 12.

It seems that the "wise, and honest and discreet persons" who were appointed commissioners by the Lord Chancellor used to eat and drink at their meetings and the meetings of creditors at the cost of the bankrupt's estate. This appears from a clause at the end of the statute, which, after reciting the civil practice, provided that if any commissioner spent any part of the estate in eating or drinking, he should not be again appointed commissioner under the bankrupt statutes. That clause is as follows: "And whereas commissions of bankrupts have been often executed with great expense in eating and drinking at the meetings of the commissioners, or some of them, therein named, to the great prejudice of the bankrupts and their creditors; be it further enacted by the authority aforesaid, that there shall not be paid or allowed by the creditors, or out of the estate of the bankrupts, any monies whatsoever for expenses in eating or drinking of the commissioners, or of any other persons at the times of the meetings of the said commissioners, or of any of the creditors, or others, in order to execute or prepare matters for the execution of such commissions; and if any person or persons named, or to be named, as a commissioner or commissioners in any such commission, shall order any such expense to be made, or eat or drink at any such meeting, at the charge of the creditors, or out of the estate of such bankrupts, every such commissioner so offending, shall be disabled for ever after to act as a commissioner in such or any other commission founded on the statutes made against bankrupts" (p).

(o) See para. 721.

(p) 4 Ann. c. 17, at the end of the

statute.

Paras.
13, 14

13. 5 Ann. c. 22.—By another statute passed in 1706, the consent of a specified majority of creditors was made necessary before a certificate of conformity could be granted. By the same statute provision was also made for the appointment of assignees by the creditors, and the commissioners were required, on such appointment, to assign the bankrupt's estate to the assignees for the benefit of the creditors. Power was also given to the assignees to compound with the debtors of the bankrupt. It was also provided that no commission should issue unless the debt of the petitioning creditor or creditors amounted to a specified sum.

14. 5 Geo. 2, c. 30.—In 1732 another Act was passed which was called "An Act to prevent the committing of frauds by bankrupts." This Act was "little more than a transcript, with some improvement, of the two Acts of Anne, which, being only temporary, had been continued by various enactments through the reign of George I.; so that, though nominally bearing the more recent date of the reign of George II., yet, in fact, the Bankrupt Law had been administered with little alteration or improvement from 1705, till Sir S. Romilly undertook to effect some amendments in it, in the year 1806. That eminent person, from his great practice in bankruptcy, had become fully acquainted with the imperfections of the system, and wanted not the inclination to introduce a vigorous and comprehensive measure of reform. But Sir S. Romilly had fallen on times when extensive plans of improvement were usually met with jealousy and distrust; nor were his high character and great attainments ever able to inspire that confidence, without which it is in vain to advocate the soundest measures of wisdom and beneficence. The full extent, therefore, of the reform which he effected, was comprised in the two statutes of the 46 Geo. 3 and the 49 Geo. 3, which, though they contain some provisions of considerable value, yet had been so much altered in their progress through Parliament, that he is said to have never been much pleased at their passing by his name. While Sir S. Romilly was thus amending the detail of a vicious code, a comprehensive view of it was published by Sir W. D. Evans, (afterwards Recorder of Bombay), under the title of *A Letter on a Revision of the Bankrupt Laws*. This valuable little work, at once highly scientific and practical, pointed out almost every evil which then existed, and suggested almost every remedy or improvement which has since been adopted. It is pleasing to observe the triumph which honesty and good sense are enabled *in time* to obtain over all the clamours of intolerance and prejudice, and over all the resistance which the indolence and timidity of some and the interested opposition of others, are sure to interpose. The pamphlet of the retired and unobtrusive provincial barrister, though at first coldly received, yet gradually excited the interest and gained the confidence of the public; and much of what is valuable in subsequent legislation has been taken from its suggestions. Thus we may trace some of the excellent provisions of the Act of 1831 to the Letter of 1810; as, the

constitution of a better tribunal ; the issuing the process in bankruptcy without the personal interference of the Great Seal ; and the appointment of Assignees, receiving a compensation out of the estate for their labours and vigilance. Sir W. Evans appears, both from this and his other publications, to have been much versed in the Civil Law. He had escaped that master-piece of English lawyers, the habit of looking only to the system under which they are educated : he had none of the narrow spirit of undervaluing the codes of other nations, and treating the study of them as a matter of ingenious speculation, but of no practical utility. He first suggested the principle of Voluntary Cession : which was a startling subject at a time when every thing like a friendly commission was considered as a badge of fraud, but which is, nevertheless, founded on the soundest principles of mercantile expedience and abstract justice, and which, accordingly, found its way into our code fifteen years afterwards, in the act of the 6 Geo. 4 " (g).

15. 6 Geo. 4, c. 16.—In 1825 all previous enactments relating to bankruptcy were repealed and a consolidating statute was passed, being 6 Geo. 4, c. 16. This statute authorised for the first time the issue of a commission at the instance of a creditor upon a declaration of bankruptcy by the debtor. It was the precursor of the provision in the Bankruptcy Act, 1849, which allowed a debtor to petition for an adjudication against himself (r). Prior to the Act of 1825 it was considered fraudulent for a debtor to procure his own bankruptcy.

16. Procedure.—Until the establishment of a Court of Bankruptcy in 1831 proceedings in bankruptcy were commenced by a petition to the Lord Chancellor by a creditor or creditors. The debt, or where there were two or more creditors, their aggregate debts, must amount to a specified sum. The debt had to be proved by an affidavit. A commission was then issued by the Lord Chancellor. The commissioners then met and took an oath for the due execution of their commission. The commissioners determined whether the debtor was a trader and whether he had committed an act of bankruptcy. If these facts were proved, the debtor was declared a bankrupt. The estate of the bankrupt was assigned to assignees chosen by the creditors, and it vested in them for the benefit of the creditors. The commissioners had the power of appointing *interim* assignees. The bankrupt had then to surrender himself and all his estate to the commissioners. The bankrupt, his wife and all other persons who could give evidence touching the affairs of the bankrupt were then examined by the commissioners. If any of these persons refused to answer, the commissioners could commit him or her to prison, but the commissioners were required in that case to specify in the warrant of commitment the question which the witness refused to answer. If any gaoler permitted any such person to escape, he was to

(g) Henley's Bankrupt Law, 3rd ed., pp. iv-vi.

(r) B. A., 1849, s. 86.

**Paras.
16-18**

forfeit 500*l.* to the creditors. If the bankrupt made a full disclosure of his property and conformed in all respects to the directions of the law, a certificate of conformity was granted to him. If any question arose on the interpretation of the statutes, it was decided by the common law Courts. Questions which were strictly within the province of the Court of Chancery, such as the distribution of partnership assets on the bankruptcy of partners, were decided by the Court of Chancery. Thus in *Ex parte Crowder (s)*, decided in 1715, a joint commission was issued against two partners. A question arose as to the respective liabilities of the joint estate and the separate estates, and it came up before the Court of Chancery. In that case the Lord Chancellor directed as follows:—"as the joint or partnership estate was in the first place to be applied to pay the joint or partnership debts, so in like manner the separate estate should be in the first place to pay all the separate debts; and as separate creditors are not to be let in upon the joint estates until all the joint debts are first paid, so likewise the creditors to the partnership shall not come in for any deficiency of the joint estate, upon the separate estate, until the separate debts are first paid." This is precisely the rule laid down in the Presidency-towns Insolvency Act, sec. 49 (4) and the Provincial Insolvency Act, sec. 61 (4).

17. Court of Bankruptcy.—In 1831 an important alteration was made in the machinery for the administration of the estates of bankrupts. A permanent Court of Bankruptcy was established in that year by 1 and 2 Will. 4, c. 56. The Court was to consist of four judges and six commissioners and it was constituted a Court of law and equity. The judges or any three of them were to form a Court of Review. A fiat was substituted for the commission, and the commissioners were to proceed on the fiat as if it was a commission of Bankrupt under the Great Seal. The system of official assignees was introduced and one of them was to be appointed to act in each bankruptcy. The bankrupt's estate vested in the official assignee jointly with the assignees chosen by the creditors. No deed of assignment was necessary, and the estate vested in the assignees by virtue of their appointment. The Court of Review was abolished in 1847 and its jurisdiction was transferred to the Court of Chancery. Bankruptcy business in England is now administered by a Judge of the High Court specially appointed for the purpose by the Lord Chancellor and in the rest of England by County Court Judges.

18. Subsequent Bankruptcy Acts.—The most important bankruptcy statutes were those passed in 1849, 1869, 1883 and 1914. The principal changes introduced by those Acts will be considered in their proper place in the course of these Lectures. Here it suffices to say that the certificate of conformity was abolished in 1861 and an

order of discharge was substituted for it. The institution of commissioners was finally abolished in 1869. The institution of official assignees was also abolished in 1869. By the Bankruptcy Act, 1869, it was declared that the persons chosen by the creditors as assignees should be designated by the title of trustees in bankruptcy by which name they are still known. Procedure by fiat was abolished in 1849 and a petition for adjudication of bankruptcy was substituted, and orders of adjudication were made on such petitions. The Bankruptcy Act, 1883, introduced a new provision by which the Court, instead of making an adjudication order, was required to make a receiving order. This provision is retained in the Bankruptcy Act, 1914, which is the Act now in force in England. The object of making a receiving order is to give an opportunity to the creditors to decide whether the estate should be wound up in bankruptcy or under a composition or scheme of arrangement. If after a receiving order is made the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt or pass no resolution, or if the creditors do not meet or if a composition or scheme is not approved within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court is required to adjudge the debtor bankrupt; but if a composition or scheme is approved by the creditors, the receiving order is rescinded.

19. Court for the Relief of Insolvent Debtors.—The various earlier statutes that were passed from time to time were confined to traders. No adequate protection was given to insolvent non-traders. In 1838 an Act was passed by which a Court was established for giving relief to insolvent non-traders called the “Court for the Relief of Insolvent debtors” (t). In 1844 the Act was amended by 7 and 8 Vict. c. 96 and provision was also made for a protection order by 5 and 6 Vict. c. 116. Under these Acts the debtor obtained protection against arrest, but his after-acquired property remained liable for his debts. The Bankruptcy Act, 1861, made all debtors, whether traders or non-traders, liable to bankruptcy and abolished the Court for the Relief of Insolvent debtors. Discussing this subject a learned writer says: “There seems indeed no good reason why any difference should exist as to the administration of justice in the case of persons who are engaged in trade and those who are not; and there is no good reason why one man should not be compelled to pay his debts or distribute his assets among his creditors as well as another, nor why all should not be subject to the same process of compulsion; but the distinction between persons in trade and those not so has nevertheless much to be said in its favour, not indeed when insolvency has once been established, but as to the *prima facie* tests of

(t) 1 and 2 Vict. c. 110.

**Paras.
19, 20**

insolvency in the different cases. For instance, a person in trade is bound by the very course of his business to make provision for meeting his debts at fixed dates and a fixed place; if, therefore, a trader absents himself from his shop or counting-house, and leaves no provision for meeting his liabilities as they fall due, it may reasonably be assumed that he intends to defeat or delay his creditors, and that he is practically insolvent: so also if he goes abroad, leaving no means of getting at him readily, and not having made provision for the payment of his debts in his absence: but if a private gentleman happen to go abroad, leaving some of his tradesmen unpaid, and, from not expecting to be called on to pay in his absence, has left no provision for meeting such calls if made, that is obviously not *prima facie* evidence that the gentleman in question is even embarrassed in his means; there are in such a case no grounds for superseding the ordinary process of the courts of law and equity, and no foundation in reason for the bankrupt jurisdiction. It seems reasonable therefore that the distinction should be preserved for this purpose, as it has been in fact; and that a different list of acts of bankruptcy should be established in the case of traders and those not in trade; that is to say, some acts, which could not properly be esteemed acts of bankruptcy in the case of persons not in trade, may still be safely considered such in the case of traders; and where these specific acts of bankruptcy are concerned, of course proof of the trading would form a condition precedent to the exercise of the court's jurisdiction" (u).

20. Insolvency law in Presidency-towns.—The first Insolvency Courts in the Presidency-towns (v) were established by the statute 9 Geo. 4, c. 73, passed in the year 1828. The Courts were called "Courts for the Relief of Insolvent Debtors". They were separate Courts and they were all Courts of Record. Any person aggrieved by an order of the Court for the Relief of Insolvent Debtors had a right to make a petition to the Supreme Court, and the Supreme Court had the power after hearing the parties to make such order on the petition as it thought just and the order was binding upon the parties and upon the Court for the Relief of Insolvent Debtors.

The officers of the Insolvent Debtors Court were appointed by the Supreme Court. One of such officers was the "Common Assignee." If a petition for adjudication was presented by a creditor and an order of adjudication was made, the property of the insolvent vested in the Common Assignee by virtue of the order. Provision was also made for *interim* protection orders. The Act was partly on the lines of the English Bankruptcy Acts and partly on the lines of the English Acts for the Relief of Insolvent Debtors.

The Act of 1828 was to be in force only up to 1st March 1833. It was, however, continued by 2 and 3 Will. 4, c. 38, until 1st March 1836.

(u) Griffith on Bankruptcy, pp. 2-3.
(v) That is Calcutta, Madras and

Bombay.

The Act of 1828 was amended in certain respects in 1834 by 4 and 5 Will. 4, c. 39. Both the original and the amending Acts were continued by subsequent legislation until 1848.

Paras.
20-22

21. Indian Insolvency Act, 1848.—In 1848 the previous enactments were repealed and an Act was passed called the Indian Insolvency Act, being 11 and 12 Vict., c. 21. The Act preserved the distinction between traders and non-traders in certain respects which are noted in their proper place in the following Lectures. By this Act the Courts for the Relief of Insolvent Debtors established by the Act of 1828 were continued, but the Court was to be held before a Judge of the Supreme Court (*w*).

22. High Courts Act and Letters Patent.—In 1861 an Act was passed being 24 and 25 Vict., c. 104. By that Act the Supreme Courts were abolished and High Courts were established in India. By sec. 11 of that Act it was provided as follows:—

“Upon the establishment of the said High Courts in the said Presidencies respectively all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council or charters, or of any Acts of the Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts, and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council.”

The Insolvency Courts still continued to be separate tribunals and were not affected by the Act of 1861 except that a Judge of the High Court was to preside over such Court. By clause 17 of the Letters Patent of 1862, it was provided that the Court for the Relief of Insolvent Debtors in each of the three Presidency-towns should be held before one of the Judges of the High Court, and that the High Court and any such Judge thereof should have and exercise, *whether within or without the Presidency*, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

(*w*) Act 28 of 1865 provided for the speedy liquidation of the estates of insolvent traders in Bombay. Power was given under that Act to the creditors to resolve in certain events that the estate of an insolvent trader ought to be wound up under the management of trustees. Upon such resolution being passed

and application was made to the Court for winding up the estate in the terms of the resolution, and an order was made by the Court vesting the estate of the insolvent in trustees appointed by the creditors. This Act was repealed by Act 8 of 1868.

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22, 23**

On the 28th December 1865, the Amended Letters Patent were granted, the object being to make further provision respecting the constitution of the High Courts and the administration of justice by those Courts. The principal alteration introduced by the Amended Letters Patent was that a High Court in the exercise of its insolvency jurisdiction could no longer exercise any of its powers "within or without the Presidency" as it did under the Letters Patent of 1862, but could do so only *within the Presidency*.

23. Presidency-towns Insolvency Act, 1909.—Early in the twentieth century it was realised that the Indian Insolvency Act, 1848, had become antiquated, and it was decided to make a new law on the lines of the English Bankruptcy Acts. That Act of 1848 was accordingly repealed and a new Act was passed in 1909, being the Presidency-towns Insolvency Act based on the Bankruptcy Act, 1883, and the Bankruptcy Act, 1890. The main defects of the Indian Insolvency Act, 1848, were that the Act was more for the benefit of the debtors than for the benefit of the creditors. The provisions for the discovery of the insolvent's property were inadequate and the burden of proving misconduct on an application by the insolvent for his discharge rested entirely on the creditors. The powers of the Official Assignee were very limited. He merely collected assets and he had no power to intervene in any proceedings. By the new Act large powers are given to the Courts to compel the discovery of the insolvent's property. By sec. 79 the Official Assignee is required to investigate the conduct of the insolvent and to report to the Court upon any application for discharge, stating whether there is reason to believe that the insolvent has committed any insolvency offence or any of the offences mentioned in secs. 421 to 424 of the Indian Penal Code in connection with his insolvency or which would justify the Court in refusing, suspending or qualifying an order for his discharge. The report of the Official Assignee is to be *prima facie* evidence and the Court may presume the correctness of any statements contained therein. The Official Assignee is also required to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct. Provision is also made to enable insolvency proceedings to be taken by or against a firm in the name of the firm.

The Indian Insolvency Act, 1848, was an Act of the British Parliament. Under sec. 7 of that Act, on the making of a vesting order the property of the insolvent wherever situate vested in the Official Assignee. The vesting order operated as a statutory transfer of immovable property situate not only within British India but also within the British Empire outside British India. The order, however, could not operate as a statutory transfer of immovable property situate in a foreign country unless it was specially recognized by the law of the foreign country in which the property was situate. By sec. 17 also of the Presidency-towns Insolvency Act, on the

making of an order of adjudication the property of the insolvent wherever situate vests in the Official Assignee. The Act, however, is an Act of the Indian Legislature, and an order of adjudication made under it cannot operate as a statutory transfer of immovable property situate outside British India. Again an order of discharge under the Indian Insolvency Act, 1848, operated throughout the British Dominions. An order of discharge under the Presidency-towns Insolvency Act can have no such effect. Both these drawbacks were considered by the Legislature before passing the Presidency-towns Insolvency Act, and on the whole it was thought desirable to pass that Act instead of waiting for an indefinite period for a new Act from the British Parliament. Events have shown, as it then was believed, that no serious difficulties have arisen under either head.

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23, 24

24. Insolvency law in the mofussil.—Dr. Whitley Stokes says in his *Anglo-Indian Codes* (x) that the Code of Civil Procedure, 1859, “contained a germ, but only the germ, of an insolvent law”, but it is difficult to find any trace of any such law in that Code. A mere provision that when a sale takes place under a decree the proceeds should first be applied in paying the whole of that decree and then be distributed rateably among the other creditors, or a provision that a debtor who has been arrested may apply for discharge on giving up all his property, and that if the Court discharged him his person was not to be arrested again under the same decree, and that the decree-holder was to be paid out of the proceeds of the property, cannot be said to be a germ of an insolvent law. Under that Code even if the judgment-debtor surrendered the whole of his property to the Court he was not protected as against any debt other than that for which he had been arrested. The first attempt to introduce insolvency law into the provinces was made in 1877 (y). Some fifteen rules were framed and incorporated in Chapter 20 of the Code of Civil Procedure, 1877, and power was given to District Courts to entertain insolvency petitions and to make orders of discharge. Those rules were contained in secs. 344 to 360 of that Code and they were reproduced with some alterations in Chapter 20 of the Code of Civil Procedure, 1882. In 1907 the first Provincial Insolvency Act was passed containing about fifty-six sections. The Act contained a simple but fairly complete procedure in insolvency adapted to the provincial Courts. The Act of 1907 was repealed by the Provincial Insolvency Act, 1920, which is the Act now in force.

The Provincial Insolvency Act, 1920, abolished the debtor's right to be released from prison, if he was in prison at the date of the order of adjudication, which was conferred upon him by sec. 16 of the Provincial

(x) Vol. 2, p. 418.

(y) Under the Punjab Laws Act, 1872, the property in the Punjab of debtors who have, by an order under the Act, been declared insolvent does not vest in any person. The Court is entrusted by s. 27

with merely administrative powers with regard to it: *Official Assignee, Bombay v. Registrar, Small Cause Court, Amritsar* (1910) 37 I. A. 86, 37 Cal. 418, 6 I. O. 273.

**Paras.
24-26**

Insolvency Act, 1907. That section provided *inter alia* that on the making of an order of adjudication the insolvent, if imprisoned for debt, shall be released, and thereafter except as provided by that Act, no creditor to whom the insolvent was indebted in respect of any debt provable under the Act shall during the pendency of the insolvency proceedings have any remedy against the property or person of the insolvent in respect of the debt. The privilege thus conferred by the Act of 1907 was taken away by the Act of 1920, and two new sections were substituted (2), one of them providing for his release from arrest before adjudication and the other providing for a protection order after adjudication.

25. Bankruptcy offences.—There is one very important distinction between the English law and the Indian law and that is as to bankruptcy offences. Under the English law the burden of proving that the bankrupt had no intent to defraud rests upon the bankrupt. This is a very salutary rule and it does not involve any hardship on the bankrupt for he is in a position to know of the circumstances which go to establish his innocence. This is in accordance with the provisions of sec. 106 of the Indian Evidence Act, 1872, which provides that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. In India, the burden of proving fraudulent intent is on the prosecution, and this, it seems, is the main reason why there are so few prosecutions for bankruptcy crimes in this country. It is worth considering whether the English rule of evidence should not be introduced into India.

26. Questions of title.—In England a distinction has been made between claims arising out of the bankruptcy and claims not arising out of the bankruptcy. A claim arises out of the bankruptcy, where, but for the actual bankruptcy, the transaction would not have been impeached, *e.g.*, a voluntary settlement or a transfer by way of fraudulent preference. In the matter of such claims the trustee in bankruptcy has, by the operation of the bankruptcy law, a higher title than the bankrupt. A money claim or a claim to property which the bankrupt has against third persons is a claim which does not arise out of the bankruptcy. In the matter of such claims the trustee in bankruptcy has no higher title than the bankrupt. He can claim only such rights as the bankrupt himself would have had.

Every Court possessing jurisdiction in bankruptcy has full power to decide all questions arising out of the bankruptcy, where the trustee claims by a higher title than the bankrupt, but even this jurisdiction is not exclusive, and in a proper case the matter is left to the ordinary tribunals, as where the amount at stake is large or questions of character are involved. The last English case, it is believed, in which this was done was *Sharp v. McHenry* (a). In that case a mortgagee commenced an action in the Chancery Division against the trustee in bankruptcy for an account of what was

(2) Prov. I. A., (1920) ss. 23, 31.

(a) (1887) L. T. 747.

due to him on the security of a bill of sale, and to enforce the security by foreclosure or sale. The trustee applied for a stay of the action on the ground that the same questions would have to be determined on the hearing of the application as those which arose in the action, namely, whether the bill of sale was or was not fraudulent and void, and that such questions would be better tried in the Court of Bankruptcy than in the Chancery Division. The motion was heard by Kay, J., and the learned Judge refused to grant a stay. The learned Judge referred to a number of cases all considered in paragraphs 59 and 62C below, and held that the jurisdiction of the Court of Bankruptcy even as to cases in which the trustee claimed by a paramount title was not exclusive, and that the amount involved being a very large one and issues having been already raised, the action should be allowed to proceed. In India it has been held that the Insolvency Court alone has jurisdiction in matters arising out of the insolvency, and that no suit lies in a civil Court to set aside a voluntary settlement or a transfer by way of fraudulent preference. **Para. 26**

Where the trustee claims only the same right as the bankrupt would have had, the general rule is that the Court of Bankruptcy will not exercise jurisdiction as against a stranger to the bankruptcy unless he submits to the jurisdiction. Hence mere money claims by the trustee in bankruptcy will not be entertained by the Court of bankruptcy, not because the Court has no jurisdiction to entertain them, but because as a general rule it is not expedient that it should do so.

Sec. 7 of the Presidency-towns Insolvency Act, as it stood before amendment, was based on sec. 72 of the Bankruptcy Act, 1869, and sec. 102 (1) of the Bankruptcy Act, 1883. Under that section the High Courts of Calcutta and Bombay followed the English practice and refused to assume jurisdiction in the matter of claims not arising out of the insolvency. The High Court of Madras, on the other hand, assumed jurisdiction even in matters not arising out of the insolvency, not because it did not recognise that the insolvency Court had a discretion under the section to exercise jurisdiction in such cases, but because it thought that it was in the interests of the creditors that claims even of that character should be adjudicated on by the Insolvency Court. In one case it was held that it had the power to adjudicate on claims relating to immovable property situate in any part of the Madras Presidency. In another case it was held by a Full Bench that a Judge sitting in insolvency had the power to issue a summons called a "garnishee summons" upon a debtor of the insolvent though the debtor resided and carried on business in Calcutta. These decisions were productive of great hardship and on the recommendation of the Civil Justice Committee sec. 7 was amended by Act 19 of 1927 by adding a proviso which says that "unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under sec. 36,

Para. 26 be exercised only in the manner and to the extent provided under that section ". Sec. 36 of the Act empowers the Court to summon before it for examination any person supposed to be indebted to the insolvent or known or suspected to have in his possession any property belonging to the insolvent. Under sub-secs. (4) and (5), before they were amended, the Court had power, if it was satisfied that such person was indebted to the insolvent, to order him to pay to the Official Assignee the amount in which he was indebted, and if it was satisfied that any such person had in his possession any property belonging to the insolvent, to order him to deliver it to the Official Assignee. Sub-secs. (4) and (5) were also amended by the same Act and the Court has no longer power to direct any person to make any payment to the Official Assignee unless he admits the debt or to deliver any property to the Official Assignee unless he admits possession of the property.

The proviso to sec. 7 is not happily worded. Suppose that a person is examined under sec. 36 in respect of a voluntary settlement or a transfer by way of fraudulent preference, and he does not admit the claim of the Official Assignee. Has the insolvency Court no power to decide the claim unless such person consents to the claim being tried by that Court? If the proviso is construed literally, the Insolvency Court can have no power to determine the question, the matter being one arising under sec. 36 within the meaning of the proviso. It is difficult to believe that such a result was intended by the Legislature. The proviso, it is believed, relates only to claims not arising out of the insolvency. It does not, however, include all such claims but only such claims as arise for decision under sec. 36 of the Act. No claim, however, can arise for decision under that section unless the person against whom the claim is made has been previously examined by the Court, and the proviso does not cover cases of claims against third persons who have not been examined under that section. The result is that in the matter of claims against third persons who have not been examined under sec. 36, the Insolvency Court may decide such claims even if they may be money claims, for it has the power to do so under the first part of sec. 7, unless, following the English practice, it refuses in the exercise of its discretion, to assume jurisdiction in such cases. It may be observed that at one time it was proposed to draft the proviso on the lines of the proviso to sec. 105 (1) of the Bankruptcy Act, 1914. The proviso to sec. 105 (1) contains the technical expression "claims not arising out of the bankruptcy," and this probably was the reason why the proviso to sec. 7 was drafted in its present form.

In a recent case a Full Bench of the Madras High Court held that where a person alleged to be indebted to the insolvent is examined under sec. 36, but denies liability and does not agree to the matter being tried by the Insolvency Court, the only remedy open to the Official Assignee is by way of suit, but if he is not examined under that section, the Insolvency Court has power to decide the claim, though it may, in the exercise of its discretion, refuse

to try it if the amount at stake is a large one and difficult questions are involved (b). In the course of his judgment, Beasley, J., said : " The proviso says 'for the purpose of deciding any matter under sec. 36,' and sec. 36 deals with the examination of persons suspected of being indebted to the insolvent. In all such matters, the Court has no jurisdiction under sec. 7 to deal with them, unless the garnishee admits his indebtedness." It is submitted that it is not correct to say that the Court has " no jurisdiction " under sec. 7. It has the jurisdiction or power, and that is conferred by the first part of sec. 7, but *that power is not to be exercised* for the purpose of deciding any matter arising under sec. 36.

**Paras.
26, 27**

Sec. 4 of the Act of 1920 empowers the Insolvency Court to decide questions of title as between the insolvent and third persons. There was no such provision in the Act of 1907. This gave rise to the question whether the Insolvency Court had the power, where an application was made by the Receiver for an order against a third person to deliver possession to him of property alleged to belong to the insolvent, but claimed by such person as his own, to decide questions of title as between the insolvent and such person. The High Court of Allahabad held that it had. The High Court of Calcutta held that it had not, and that the question should be tried by a Civil Court. To put an end to this conflict, sec. 4 was introduced in the Act of 1920. Since the enactment of sec. 4 the Courts exercising jurisdiction under the Provincial Insolvency Act have themselves been deciding questions of title, and there is no reported case in which the Insolvency Courts have refused to assume jurisdiction in such cases and have left the question to be tried by the Civil Courts. The Legislature itself gave them the lead, at any rate since 1920, and it further sanctified their decisions by enacting that they should operate as *res judicata*. No amendment has been made in the Provincial Insolvency Act corresponding to the one in sec. 7 of the Presidency-towns Insolvency Act. It is suggested that sec. 4 of the Provincial Insolvency Act should be amended on the lines of sec. 7 of the Presidency-towns Insolvency Act. At the same time there is no reason why subsecs. (4) to (7) of sec. 36 of the Presidency-towns Insolvency Act should not be inserted in sec. 59A of the Provincial Insolvency Act. Since an order for payment of money or for delivery of property can now be made only if the debt or possession of property is admitted, there is no danger in conferring the same power upon Provincial Courts.

27. Public examination.—One of the questions on which there was a conflict of opinion was whether the period of two years mentioned in sec. 53 of the Provincial Insolvency Act to set aside voluntary transfers was to be calculated backwards from the date of the order of adjudication or from the date of the presentation of the petition. This conflict has now been set

(b) *Official Assignee, Madras v. Narasimam Mudaliar* (1929) 52 Mad.

717, 118, I.C. 506, ('29) A.M. 705.

Paras.
27, 28

at rest and it is provided by the Insolvency Law (Amendment) Act, 1930, that the *terminus a quo* for the calculation of the period of two years is the date of the presentation of the petition. The conflict would never have arisen but for the fact that in several cases the order of adjudication was not made until several months after the date of the presentation of the petition. In some cases it was made even after two or three years. The delay was due to a large extent to the fact that the debtor has to be examined under sec. 24 of the Act before an order of adjudication can be made. This examination corresponds to the public examination of the debtor under the Presidency-towns Insolvency Act (c). Under both Acts the debtor is examined as to his conduct, dealings and property. Under the Presidency-towns Insolvency Act the examination is held after the order of adjudication has been made. It is difficult to understand why the public examination under the Provincial Insolvency Act is to be held before adjudication. Misconduct on the part of the debtor, if any such is disclosed at such examination, is not a ground upon which an order of adjudication can be refused; it is to be dealt with upon the debtor's application for his discharge (d). Why then should the order of adjudication be postponed until after such examination has been held? No benefit can result either to the State or to the creditors by continuing a system under which a period of several months must elapse before an order of adjudication is made. The examination is postponed from time to time, and this in itself is sufficient to tire out the creditors. The best course seems to be to hold the examination after the order of adjudication is made.

28. Partnership.—There is some mystery hanging round the legislation on the subject of the adjudication of firms in the Provincial Insolvency Act. There is no express provision in the Act for the adjudication of firms. The only reference to the adjudication of firms is in sec. 79 (2) (c) which empowers the High Courts to make rules "for carrying into effect the provisions of the Act . . . for the procedure to be followed where the debtor is a firm." According to the English law the act of bankruptcy must be a personal act. No act of bankruptcy therefore can be committed by a firm as such, and no adjudication can be made against a firm in the name of the firm. It can only be made against the partners individually. The Presidency-towns Insolvency Act contains express provisions for the adjudication of firms, and under that Act an order of adjudication can be made against a firm in the name of the firm. There are no such provisions in the Provincial Insolvency Act, but Rules have been made providing for the adjudication of firms. The question whether in the absence of any such provisions an order of adjudication can be made against a firm under the Provincial Insolvency Act arose in some recent cases. In some cases the difficulty was got over by saying that such adjudications were common, and in others by saying that

(c) P.-t. I. A., s. 27.

(d) *Chhatrapat Singh Dugar v. Kharag*

Singh Lachmiram (1916) 44 I. A. 11, 44 Cal. 535, 39 I. C. 788.

the Provincial Insolvency Act contains at least one section, namely, sec. 61 (4), which refers to partners and partnership property, and that the Act must therefore have contemplated an order of adjudication against a firm in the name of the firm. Sec. 61 (4) contains merely a rule of proof, namely, that in the case of partners the partnership property shall be applicable in the first instance to the payment of partnership debts and the separate property of each partner shall be applicable in the first instance to the payment of his separate debts. This rule does not justify the adjudication of a firm in the firm name. To remove these difficulties it is suggested that provisions similar to those contained in the Presidency-towns Insolvency Act should be incorporated in the Provincial Insolvency Act.

29. Relation back and protected transactions.—The provisions of sec. 57 of the Presidency-towns Insolvency Act and secs. 28 (7) and 55 of the Provincial Insolvency Act are not satisfactory and require amendment.

Before dealing with these sections we shall consider the English law on the subject. Under sec. 43 of the Bankruptcy Act, 1883 (Bankruptcy Act, 1914, sec. 37), the bankruptcy of a debtor is deemed to have relation back to, and to commence at, the moment when he committed *the earliest act of bankruptcy* which he is proved to have committed within three months before the presentation of the petition on which he is adjudged bankrupt. As to *bona fide* transactions entered into by the debtor *before the date of the receiving order* it is provided by sec. 49 of the Bankruptcy Act, 1883 (Bankruptcy Act, 1914, sec. 45), that subject to certain provisions of the Act nothing in the Act shall invalidate any such transactions provided that the person with whom such transaction is entered into has not at the time of the transaction *notice of any available act of bankruptcy* committed by the bankrupt before that time.

These two provisions of the English law are quite consistent with each other. Since the title of the trustee in bankruptcy commences when the debtor committed the earliest act of bankruptcy within three months before the presentation of a bankruptcy petition, it is consistent with reason that no transaction with the bankrupt should be protected if it was entered into with notice of any available act of bankruptcy.

When we turn to the Presidency-towns Insolvency Act what we find is that though under sec. 51 of the Act the title of the Official Assignee commences, as under the English law, when the debtor committed the earliest act of insolvency which he is proved to have committed within three months before the presentation of an insolvency petition, transactions with the insolvent, though entered into with notice of an available act of insolvency, are protected if they take place before the date of the order of adjudication and the person with whom the transaction takes place has not at the time notice of the presentation of the petition. It is difficult to understand why if the title of the Official Assignee is to commence when the earliest act of insolvency is

Para. 29 committed, transactions with the debtor entered into with notice of an available act of insolvency should be protected. This provision has the effect of bringing within the scope of the protection section a large number of transactions which would be held to be void under the English law as against the trustee in bankruptcy. It is necessary in order to restore consistency between secs. 51 and 57 of the Presidency-towns Insolvency Act that the proviso to sec. 57 should be amended as follows:—

Provided that no such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of any available act of insolvency committed by the insolvent before that time.

As under the Presidency-towns Insolvency Act, sec. 57, so under the Provincial Insolvency Act, sec. 56, a *bona fide* transaction entered into with the insolvent before the date of the order of adjudication is protected, if the person dealing with the insolvent has no notice of the presentation of the insolvency petition. The title, however, of the Receiver under the Provincial Insolvency Act [sec. 28 (7)] does not commence until the presentation of the petition on which the order of adjudication is made. These provisions of the Provincial Insolvency Act have at any rate the merit of consistency, but they are open to objection for they afford protection to a large number of transactions entered into by the debtor on the eve of insolvency to the detriment of his creditors. It is for consideration whether the provisions of the Provincial Insolvency Act relating to the commencement of insolvency should not be brought into line with sec. 51 of the Presidency-towns Insolvency Act and the sections as to protected transactions in both the Acts should not be amended as suggested above.

It is interesting in this connection to trace the course of legislation so far as it relates to the Presidency-towns Insolvency Act. Cl. 39 of the Presidency-towns Insolvency Bill which related to the commencement of insolvency was as follows:—

“The insolvency of a debtor whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence *at the date of the presentation of the petition* on which the order of adjudication is made.”

This, it will be noticed, is in accordance with the provisions of sec. 28 (7) of the Provincial Insolvency Act.

The proviso to cl. 45 of the Bill which related to protected transactions was in the following terms:—

“Provided that any such transaction takes place *before the date of the presentation of the petition* on which an order of adjudication is made and that the person with whom such transaction takes place *has not at the time notice of any available act of insolvency committed by the insolvent.*”

The Bill was circulated for opinion and it was suggested by the High Courts of Bombay and Calcutta that the title of the Official Assignee should relate back to the date of the earliest act of insolvency, the reason given being that debtors usually deal with their property up to the eve of insolvency. This suggestion was adopted and cl. 39 was amended on the lines of sec. 43 of the Bankruptcy Act, 1883. As to cl. 45 it was suggested that the proviso should be amended by substituting "notice of the presentation of the petition" for "notice of an available act of insolvency," if the title of the Official Assignee was not made to relate back to the act of insolvency. This it was not necessary to do as cl. 39 was amended so as to make the title of the Official Assignee relate back to the earliest act of insolvency. But it was nevertheless done. The result is that though the title of the Official Assignee dates back to the first available act of insolvency, in other words, he is the owner of the property between the date of that act and the date of the order of adjudication, he cannot impeach any transaction entered into during that period if the person dealing with the insolvent had no notice of the presentation of the petition even if he had notice of any available act of insolvency, except in cases where the transaction was not *bona fide* (see para. 653). The Madras High Court sought to get out of this tangle by deciding in effect that a transaction entered into with notice of an available act of insolvency, though protected by sec. 57, was not *bona fide* within the meaning of the marginal note to that section and was therefore void as against the Official Assignee; but this decision, as pointed out in para. 653(3) below, is not correct. The Madras case, however, shows the necessity of bringing the Indian law in this respect intoline with the English law. If this is done, a good many difficulties which have arisen in the working of both the Acts will disappear. But it will be necessary in that case to introduce into the Indian law the provisions of sec. 46 of the Bankruptcy Act, 1914. That section constitutes another exception under the English law to the strict application of the doctrine of relation back. It provides that the payment of money or delivery of property to a person subsequently adjudged bankrupt shall be a good discharge to the person paying the same or delivering the property, if the payment or delivery is made before the actual date on which the receiving order is made and without notice of the presentation of a bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bona fide*.

30. Reputed ownership and secured creditors.—Another subject which requires consideration relates to the exemption of secured creditors from the operation of the reputed ownership clause under the Provincial Insolvency Act. Sec. 28 of that Act consists of seven sub-sections. Amongst them are two which relate to the matter now under consideration. Sub-sec. (3) relates to reputed ownership and provides that all goods which are at the date of the presentation of the petition on which the order is made in the possession, order or disposition of the insolvent, in his trade or business,

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by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent. Sub-sec. (6) relates to secured creditors and provides that "nothing contained in this section (that is, sec. 28) shall affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." It will be remembered that in the Presidency-towns Insolvency Act this sub-section stands as a proviso to sec. 17 of that Act which corresponds to sec. 28 (2) of the Provincial Insolvency Act.

As the clause as to secured creditors follows the reputed ownership clause it has been held, and rightly held, by the High Courts of Calcutta and Madras, that the doctrine of reputed ownership does not apply to secured creditors (see para. 579). It is conceived that this result was not contemplated by the Legislature, for by far the largest number of transactions which fall within the reputed ownership clause are mortgages and other securities. Thus if a trader mortgages his goods to another, and the latter allows the goods to remain in the possession of the trader, the goods being in the reputed ownership of the trader will pass on his insolvency under the English law to the trustee in bankruptcy, and under the Presidency-towns Insolvency Act to the Official Assignee. Under the Provincial Insolvency Act, however, the rights of the mortgagee prevail over those of the Receiver. This, I think, is a mere accident. It was never contemplated by the Legislature that mortgages and other securities under the Provincial Insolvency Act should be outside the scope of the reputed ownership clause. The object of the reputed ownership clause is "to protect the creditors of a trader against the false credit which might be acquired by his being suffered to have the power and disposition of the property as his own which does not really belong to him;" in other words, the object is "to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who deal with them." If this be the principle underlying the reputed ownership clause, it cannot be that the principle, though applicable to Presidency-towns, is not suited to conditions in the mofussil. What really happened was that in the Bill as it stood before it was referred to the Select Committee, what is now sub-sec. (6), which saves the rights of secured creditors, stood as a proviso to what is now sub-sec. (2) in the same way as it now stands as a proviso to sec. 17 of the Presidency-towns Insolvency Act. The Bill as originally drafted did not contain any provision as to reputed ownership or after-acquired property.

These were inserted in the section by the Select Committee. While recasting the section the Select Committee placed the clauses relating to reputed ownership and after-acquired property immediately after what is now sub-sec. (2), and detached from that sub-section the proviso relating to the rights of secured creditors and placed it where it now stands. Nobody seems to have considered what the effect of that change would be. It was not as if the Select Committee deliberately placed the clause relating to the rights of secured creditors after the reputed ownership clause. The result is that the reputed ownership clause is a dead letter in the mofussil. If that clause is to have the same effect as under the Presidency-towns Insolvency Act, the whole of sec. 28 should be recast. Section 28 as it now stands is like a Cheap Jack's shop packed with varieties of goods some of which are for mere show.

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30, 31**

31. Examination of witnesses under Presidency-towns Insolvency Act, sec. 36.—Sec. 36 of the Presidency-towns Insolvency Act empowers the Court to summon before it any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property. This provision has given rise to the question whether the jurisdiction of the Insolvency Court to order a person to attend before it to give evidence is the same as that of a Civil Court under O. 16, r. 19, of the Code of Civil Procedure, 1908, or whether it can order any person to appear and give evidence irrespective of the distance between the place where he resides and the place where the Court-house is situate. O. 16, r. 19, provides that no one shall be ordered to attend in person to give evidence unless he resides (1) within the local limits of the Court's ordinary original jurisdiction or (2) without such limits but at a place (where there is a railway or steamer communication) less than two hundred miles distance from the Court-house. It has been held by the High Court of Calcutta that the Insolvency Court has jurisdiction under section 36 to summon any person before it for examination, though he may be residing more than two hundred miles from the Court-house (see para. 312), provided he resides in British India. The same view has been taken by the Madras High Court except that where the person to be examined is a mere witness as distinguished from a person believed to be indebted to the insolvent or to be in possession

**Paras.
31, 32**

of property belonging to the insolvent, the Court should be guided by the provisions of O. 16, r. 19. The American Bankruptcy Act, 1898, contains an express provision on this subject. Sec. 41 of that Act provides that a witness cannot be compelled to appear before a referee for examination if he lives outside the State or if he lives more than one hundred miles from the place of examination even though within the State. It is desirable that a specific provision should be made defining the power of the Insolvency Court in this respect.

32. Failure to comply with requirements of bankruptcy notice.—It is also for consideration whether the provisions of sec. 1 (1) (g) and of sec. 2 of the Bankruptcy Act, 1914, should not be incorporated in the Presidency-towns Insolvency Act. These sections empower the Court to adjudge a debtor a bankrupt if he fails to comply with the requirements of what is called a “bankruptcy notice”. These provisions are not only for the benefit of the creditor but in the long run also for the benefit of the debtor. As to bankruptcy notice it is said that it is the most favoured act of bankruptcy, and more petitions are presented to the Court founded on this act of bankruptcy than all the other acts of bankruptcy put together (e). The following are the provisions relating to bankruptcy notice:—

S. 1 (1) (g). “A debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained.”

S. 2. “A bankruptcy notice under this Act shall be in the prescribed form, and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the Court, and shall state the consequence of non-compliance with the notice, and shall be served in the prescribed manner :

“ Provided that a bankruptcy notice—

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32, 33**

- (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to, or done to the satisfaction of, the creditor ;
- (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement ; but, if the debtor does not give such notice, he shall be deemed to have complied with the bankruptcy notice if within the time allowed he takes such steps as would have constituted a compliance with the notice had the actual amount due been correctly specified therein.”

The notice can be served only by a creditor who has obtained a final judgment or order against the debtor and who is entitled for the time being to issue execution on his judgment or order.

33. Miscellaneous suggestions.—Several other suggestions have been made for amending both Acts in the Lectures which follow. No amount of legislation, however, can do any substantial good unless a change is made in what may be called the subsidiary machinery for the administration of the insolvency law in India. It is often said that creditors in this country are apathetic and that they do not assist the Official Assignee or Receiver in bringing the misconduct of the debtor to the notice of the Court. This, however, is also the case in England as appears from reported cases. In both countries where the assets are almost nil the creditors write off their debts and take no further action. In England there are two officers, one the Official Receiver, and the other the trustee in bankruptcy. The duties of the Official Receiver relate both to the administration of a debtor's estate and to the investigation of the conduct of the debtor. As regards the debtor's conduct, it is the duty of the Official Receiver to investigate it, to take part in the public examination and to report to the Court upon his conduct. The duty of the trustee in bankruptcy is to realize the property of the bankrupt and distribute it amongst the creditors. In India the Official Assignee combines in himself to a large extent the powers and duties both of the Official Receiver and trustee in bankruptcy. He has not only to investigate the conduct of the insolvent and to report to the Court upon it, but also to realise the assets of the insolvent and to distribute them amongst the creditors.

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The most important function to be performed by any officer in insolvency is to investigate the conduct of the insolvent. Unless this is done satisfactorily and the misconduct of the insolvent is brought to the notice of the Court by a responsible officer, the whole machinery of the insolvency law will continue as it now is—a machinery to enable the debtors to obtain a discharge from their debts however reckless and fraudulent their conduct may have been. It is no punishment to a dishonest debtor merely to suspend his discharge. Having regard to the large amount of work which the Official Assignees in India have to do, they cannot be expected to make such a full and exhaustive investigation into the conduct of the insolvent as would be done by an officer whose sole duty it is to make such investigation. In the Presidency-towns this can best be done by attaching a permanent solicitor and a permanent barrister to each High Court. Their sole duty should be to concentrate on the investigation of the debtors' conduct and affairs and to bring their misconduct to the notice of the Court with special reference to the provisions of the Acts which deal with insolvency offences. Prosecutions for such offences in this country are very rare, not because insolvencies are due to misfortune, but because there is no officer who could devote his full time to the investigation of the debtor's conduct. Conditions in the mofussil are much worse. There a Receiver is appointed as occasion arises. Generally he is a pleader and he has his own professional work to do. A Receiver under the Provincial Insolvency Act is a mere collector of assets, and he has neither the right nor the means to intervene. The Act nowhere imposes any duty upon him to investigate the conduct of the insolvent and to report to the Court upon it. The Court may, however, require him to make a report, and it may under sec. 38 (4) and sec. 42 (2) take such report into consideration. But the investigation cannot always be exhaustive if the Receiver is a busy practitioner. Unless some reform is made in the direction indicated above, the Insolvency Court will continue to be a place of pilgrimage for debtors, to enter at one door with offerings of debts for the god presiding in it, and to depart at the other door, discharged from all their debts and all their sins.

Paragraphs 34 to 50.—Omitted.

LECTURE II.

COURTS, THEIR JURISDICTION AND PROCEDURE.

1.—JURISDICTION.

51. Courts under the Presidency-towns Insolvency Act (s. 3).—The Presidency-towns Insolvency Act applies to the Presidency Towns, and the towns of Rangoon and Karachi. The Courts having jurisdiction in Insolvency under the Act are the High Courts of Calcutta, Madras, Bombay and Rangoon, and the Court of the Judicial Commissioner of Sind. The Act did not apply originally to the town of Karachi. It was extended to that town by the Insolvency (Amendment) Act, of 1926. Before that Act the Provincial Insolvency Act, 1920, applied. As to outstanding insolvencies under the Provincial Insolvency Act, 1920, it was provided that any proceedings under that Act pending in the Court of the Judicial Commissioner of Sind at the commencement of the Act of 1926 should continue, and all the provisions of the Provincial Insolvency Act, 1920, should apply thereto as if the Act of 1926 had not been passed (see sec. 10 of the Act of 1926).

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52. Jurisdiction of Courts under the Presidency-towns Insolvency Act (ss. 3-6).—All matters in respect of which jurisdiction is given by the Presidency-towns Insolvency Act are ordinarily to be transacted and disposed of by one of the Judges of the Court to whom insolvency work may be assigned by the Chief Justice or Judicial Commissioner from time to time. The Judge in insolvency may, subject to the provisions of the Act and rules made under the Act, exercise in chambers the whole or any part of his jurisdiction (a). Of the various heads of jurisdiction mentioned in the Letters Patent of the Chartered High Courts insolvency jurisdiction falls under ordinary original civil jurisdiction (b). The High Courts exercise the powers of an Insolvent Court under a special jurisdiction vested in them by the Insolvency Act; but though this jurisdiction is a special one, the High Courts none the less exercise it as a part of the ordinary jurisdiction which is vested in them by law (c). By sec. 90, in all proceedings under the Act the Court exercising insolvency jurisdiction has the like powers as it has in the exercise of its ordinary original civil jurisdiction, but no such power is to be exercised so as to limit the jurisdiction conferred on the Court by the Act.

(a) See Bombay Rules 4-6; Burma Rules 5-6; Calcutta Rules 5-8; Madras Rules 13-15.

(b) *In the matter of Candass Narrondass* (1889) 13 Bom. 520.

(c) *Annoda Prasad Banerjee v. Nobo*

Kishore Roy (1906) 33 Cal. 560;
Re Chidambaram Chetty (1922) 45
Mad. 31, 61 I.C. 991, ('22) A.M. 143;
Re Kancherla Krishna Rao (1928)
51 Mad. 540, at pp. 545, 546, 112
I. C. 149, ('28) A. M. 732.

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52-55

The Chief Justice or the Judicial Commissioner may also appoint an officer for disposing of certain matters specified in sec. 6 of the Act (d) ; but no such officer has power to commit for contempt of Court. Any order made or act done by such officer in the exercise of his powers is to be deemed the order or act of the Court.

53. Courts and their jurisdiction under the Provincial Insolvency Act (s. 3): District Courts.—The Provincial Insolvency Act applies in British India outside the Presidency Towns and the towns of Rangoon and Karachi, except the Scheduled Districts. The Courts having jurisdiction in insolvency are the District Courts, but the Local Government may, by notification in the local Official Gazette, invest any Court subordinate to a District Court, which includes for the purposes of the Act a Court of Small Causes, with jurisdiction in any class of cases, and any Court so invested has within the local limits of its jurisdiction (dd) concurrent jurisdiction with the District Court. The jurisdiction so conferred continues until it is withdrawn by the Local Government (e). In the absence of such notification a District Court has no power to transfer an insolvency petition for disposal to a subordinate Court (f).

54. Additional District Judge.—The expression " District Court " in sec. 3 includes the Court of an Additional District Judge exercising insolvency jurisdiction under this Act as part of the functions assigned to him by the District Court under the Bengal, N.-W. P., and Assam Civil Courts Act, 1887, and an appeal lies from his decision not to the District Court, but to the High Court. Such Judge is not subordinate to the District Court, and he does not require to be invested with insolvency jurisdiction by any notification of the Local Government (g).

55. Concurrent jurisdiction.—A subordinate Court invested with insolvency jurisdiction by the Local Government has concurrent jurisdiction with the District Court. Either Court therefore has jurisdiction to entertain an insolvency petition within its pecuniary and local limits. Where a subordinate Court is seized of a case, orders made by it cannot be interfered with by the District Court except by way of appeal under sec. 75 or under the provisions of sec. 5 of the Provincial Insolvency Act (h). It should be noticed that though the jurisdiction is concurrent, an appeal from

(d) See Cal. Rules 6-8; Mad. Rule 162; Bom. Rules 5-6; Rang. Rule 6.—See *Saratkumar v. Nabin Chandra* (1929) 56 Cal. 667 [as to examination under s. 36]; *Re J. M. Gregory* (1927) 54 Cal. 858, 106 I. C. 326, ('28) A. C. 50 [as to discharge].

(dd) See *Abaji v. Narhari* (1927) 51 Bom. 809, 104 I. C. 780, ('27) A. B. 460.

(e) See *Debi Prasad v. Stanceley* (1909) 6 All. L. J. 483, 2 I. C. 223.

(f) *Premchand Indoji v. Gopalappa* (1923) 45 Mad. L. J. 689, 75 I. C. 876, ('24) A. M. 398.

(g) *Makhan Lal v. Sri Lal* (1912) 34 All. 382, 14 I. C. 162. See Bengal, N.-W. P., and Assam Civil Courts Act, 1887, ss. 8, 20.

(h) *Digendra Chandra Basak v. Ramani Mohan Goswami* (1918) 22 C. W. N. 958, 48 I. C. 333. See also *Shankar v. Vithal* (1897) 21 Bom. 42.

the order of the subordinate Court lies to the District Judge as provided by sec. 75 of the Act.

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55-57A**

56. Restrictions on powers of certain Provincial Insolvency Courts (s. 81).—Sec. 81 of the Provincial Insolvency Act empowers the Local Government to declare that any of the provisions of that Act specified in Schedule II to the Act shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under that Act in any part of the territories administered by such Local Government.

Power to decide questions arising in insolvency.

57. Jurisdiction to decide questions arising in insolvency [P.-t. I. A., s. 7 ; Prov. I. A., s. 4]. The sections of the two Acts relating to the power of Insolvency Courts to decide questions of title are as follows :—

P.-t. I. A., s. 7.

Subject to the provisions of this Act, the Court shall have full power to decide all questions arising in insolvency. *decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.*

Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any question under section 36, be exercised only in the manner and to the extent provided in that section.

[Note:—The procedure under sec. 7 of the P.-t. I. A., is by way of motion supported by an affidavit.]

Prov. I. A., s. 4.

(1) Subject to the provisions of this Act, the Court shall have full power to decide all questions *whether of title or priority, or of any nature whatsoever, and whether involving matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.*

(2) *Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.*

(3) *Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further enquiry sell such interest in such manner and subject to such conditions as it may think fit.*

57A. Corresponding sections of Bankruptcy Acts.—Sec. 7 of the Presidency-towns Insolvency Act is based on the first part of sec. 72

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57A, 58**

of the Bankruptcy Act, 1869. The proviso to sec. 7 was added by the Presidency-towns Insolvency (Amendment) Act, 1927. Sec. 4 of the Provincial Insolvency Act, 1920, is new. There was no such section in the Provincial Insolvency Act, 1907. Sec. 4 (1) is based, like sec. 7 of the Presidency-towns Insolvency Act, on sec. 72 of the Bankruptcy Act, 1869. Sec. 4 (2) provides that decisions of Provincial Insolvency Courts shall in certain cases have the binding force of *res judicata*. There is no such provision in sec. 7 of the Presidency-towns Insolvency Act, but the same result has been arrived at in some cases by applying the provisions of sec. 11 of the Code of Civil Procedure, 1908. Sec. 4 (3) enables in express terms a Provincial Insolvency Court to sell the interest of the insolvent in any property in which the Court has reason to believe he has a saleable interest. The Courts having jurisdiction in insolvency under the Presidency-towns Insolvency Act have the like power. It will be observed that though sec. 7 of the Presidency-towns Insolvency Act was amended in 1927 by adding the proviso, no such amendment was made in sec. 4 of the Provincial Insolvency Act.

Sec. 72 of the Bankruptcy Act, 1869, was in the following terms:—“Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.” The Bankruptcy Act, 1869, was repealed by the Act of 1883 and sec. 72 was re-enacted as sec. 102 (1). At the same time a proviso was added in sec. 102 (1) which relates exclusively to County Courts. That proviso is as follows:—“Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, *not arising out of the bankruptcy*, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money's worth, or right in dispute does not, in the opinion of the Judge, exceed in value two hundred pounds.” The Bankruptcy Act, 1883, was repealed by the Act of 1914, and sec. 102 (1) of the Act of 1883 including the proviso as to County Courts was re-enacted as sec. 105 (1) in the Act of 1914. The language of the proviso to sec. 7 of the Presidency-towns Insolvency Act has been borrowed partly from the proviso relating to County Courts.

*Distinction between claims arising out of bankruptcy
and claims not arising out of bankruptcy.*

58. Superior title of trustee in bankruptcy in certain cases.—Bankruptcy is entirely the creation of statute law. There is no such thing as a common law of bankruptcy. The powers of a Court of Bankruptcy

are those given to it by statute. In order to understand the exact nature of the powers of the Courts of Bankruptcy it is necessary to appreciate the distinction between claims arising out of the bankruptcy and those not arising out of the bankruptcy. A claim *arises out of the bankruptcy* where, but for the actual bankruptcy, the transaction would never have been impeached, e.g., a voluntary settlement or a transfer by way of fraudulent preference. In the matter of such claims the trustee in bankruptcy has, by the operation of the bankruptcy law, *a higher title than the bankrupt*. A money claim or a claim to property which the bankrupt has against third persons is a claim which *does not arise out of the bankruptcy*. In the matter of such claims the trustee in bankruptcy has *no higher title than the bankrupt*. He can claim only the same right as the bankrupt himself would have had (i).

The distinction between claims arising out of the bankruptcy and those not arising out of the bankruptcy may be illustrated by two cases. First let us take the case of a claim arising out of the bankruptcy. Suppose that a person settles his property upon his wife, the settlement not being in consideration of marriage. The settlement is perfectly valid, and the settlor cannot impeach it merely on the ground that it was without consideration. If, however, the settlor becomes bankrupt within two years after the date of the settlement, the transaction is void as against the trustee in bankruptcy, and he is entitled to have it set aside for the benefit of the settlor's creditors. This right is a creature purely of the bankruptcy law. It *arises out of the bankruptcy* of the settlor. It has no existence apart from it. The right vests in the trustee by virtue of the superior title which he has under the Bankruptcy Act (j), and the Court of Bankruptcy is the proper tribunal to adjudicate on the trustee's claim. Next let us take the case of a claim not arising out of the bankruptcy. Suppose that *A* owes money to *B*, or is liable to *B* for damages for breach of contract or for injury to *B*'s property or that he is liable to transfer to *B* property held by him *benami* for *B*. In each of these cases *B* is entitled to sue *A* for the recovery of money or of damages or of the property as the case may be, but if *B* becomes bankrupt, the right of action vests in the trustee in bankruptcy. Here there is no right arising out of the bankruptcy, and the trustee has no higher title than the bankrupt himself had. The right was in *B* before he was adjudged bankrupt. The effect of the adjudication is merely to transmit the right to the trustee. The trustee having no higher title than the bankrupt himself would have had, the Court of Bankruptcy will, as a general rule, refuse to exercise the jurisdiction, which it has, to try such claims, and will leave the matter to be determined by the ordinary tribunals. *A* is not a party to the bankruptcy. He is a stranger to the bankruptcy, and the Court of Bankruptcy,

(i) *Re Hawke* (1885) 16 Q.B.D. 503, 506. | Prov. I. A., s. 53.
 (j) B.A., 1914, s. 42; P.-t. I. A., s. 55; |

**Paras.
58, 59**

as a general rule, declines to determine questions affecting strangers to the bankruptcy.

The following are some of the matters in which the trustee in bankruptcy has a higher title than the insolvent would have had :—

- (1) Transfers of property by the bankrupt which having been made between the commencement of the bankruptcy and the date of the order of adjudication come within the jurisdiction of the Courts of Bankruptcy by virtue of the doctrine of relation back [B.A., 1914, s. 37 (2) ; P.-t. I. A., ss. 51, 52 (2) ; Prov. I. A., s. 28 (7)].
- (2) Possession by the bankrupt of goods of which he is the reputed owner to which the trustee in bankruptcy is entitled by the operation of the bankruptcy law [B.A., 1914, s. 38 (2) (c) ; P.-t. I. A., s. 52 (2) (c) ; Prov. I. A., s. 28 (3)].
- (3) Transfers within two years of the bankruptcy not made in good faith and for consideration [B.A., 1914, s. 42 ; P.-t. I. A., s. 55 ; Prov. I. A., s. 53].
- (4) Transfers by way of fraudulent preference in favour of creditors [B.A., 1914, s. 44 ; P.-t. I. A., s. 56 ; Prov. I. A., s. 54].
- (5) Transfers which are in themselves acts of bankruptcy [see B.A., 1914, s. 1 (1) (a), (b) ; P.-t. I. A., s. 9 (a), (b), (c) ; Prov. I. A., s. 6 (a), (b), (c)].

*Jurisdiction to decide questions arising in bankruptcy
under the English law.*

59. Exercise of jurisdiction under the English law discretionary.—The Indian sections being practically identical with the English section, it is desirable to deal first with the English law, for it is the rules laid down in the English cases which must to a large extent guide the Courts in India in determining the questions now under consideration.

The jurisdiction of the Court of Bankruptcy under the Bankruptcy Act, 1849, was a limited one. Under that Act the Court of Bankruptcy had jurisdiction over the bankrupt and his estate, and over the assignees in their dealings with the estate, and in all matters of bankruptcy as between the assignees and creditors, but it had no power to determine questions of title as between the assignees and third persons unless they submitted to the jurisdiction of the Court. Questions of this kind were required to be determined by the ordinary Courts of common law and equity (k). Nor had the Court

(k) B.A., 1849, s. 12.

power to determine priorities as between incumbrancers without their consent (*l*). Para. 59

Enlarged powers were given to the new Courts of Bankruptcy by the Bankruptcy Act, 1869, under sec. 72 of that Act. Under that section the Courts of Bankruptcy received the power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Courts, or which they might deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. This section, it will be noticed, is in almost the same terms as sec. 7 of the Presidency-towns Insolvency Act, before it was amended by the Act of 1927, and as sec. 4 (1) of the Provincial Insolvency Act. It was also provided by secs. 65 and 66 of the Bankruptcy Act, 1869, that the chief and local judges should, for the purposes of the Act, have all the powers and jurisdiction of a judge of a Court of Chancery. The language of these provisions indicated an intention to confer on the new Courts of Bankruptcy an enlarged jurisdiction such as would enable them to determine even as against strangers to the bankruptcy all questions arising in any case of bankruptcy coming within their cognizance and requiring to be determined in order to effect a complete distribution of the bankrupt's estate (*m*). The jurisdiction thus given was held to be discretionary, and as a general rule to be exercised only so far as related to matters connected with the administration of the bankruptcy law and to *questions arising out of bankruptcy*, as, for instance, questions of voluntary transfers or fraudulent preferences. Hence it was held that a mere money demand by the trustee in bankruptcy ought to be brought before the ordinary tribunals; and that as a general rule cases in which the title of the trustee did not depend on the peculiar law of bankruptcy but on the general law, statutory or otherwise, ought to be left to the same tribunals, not because the Courts of Bankruptcy had not jurisdiction to entertain them, but because, as a general rule, it was not expedient that they should do so (*n*). The Court, however, would not refuse to exercise its jurisdiction if a stranger to the bankruptcy was willing to submit or had submitted to the jurisdiction (*o*).

The Bankruptcy Act, 1869, was repealed by the Bankruptcy Act, 1883, but the provisions of sec. 72 of the Bankruptcy Act, 1869, were reproduced in sec. 102 of the Bankruptcy Act, 1883. At the same time several changes were introduced. The business of the London Bankruptcy Court was assigned to the High Court and there was no longer a separate Court of

(*l*) See *Ex parte Allison* (1823) 1 Gl. & J. 210; *Ex parte Royds* (1834) 3 D. & C. 294, cases prior to B. A., 1849.

(*m*) See *Ex parte Anderson* (1870) L. R. 5 Ch. App. 473, 479-480.

(*n*) *Ellis v. Silber* (1872) L. R. 8 Ch. App.

83; *Ex parte Dickin* (1878) 8 Ch. D. 377; *Ex parte Musgrave* (1879) 10 Ch. D. 94; *Ex parte Brown* (1879) 11 Ch. D. 148.

(*o*) *Ex parte Fletcher* (1878) 9 Ch. D. 381; *Ex parte Davies* (1881) 19 Ch. D. 86.

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59, 60**

Bankruptcy. A limit was also put upon the jurisdiction of County Courts. County Courts no longer possessed jurisdiction to adjudicate upon a *claim not arising out of the bankruptcy*, unless all parties to the proceeding consented thereto or the amount did not exceed in value two hundred pounds. Other subsidiary changes were also made. These considerations, as stated in Williams on Bankruptcy (p), "point to an intention by the legislature that the High Court in bankruptcy should under that Act exercise that jurisdiction between the trustee in bankruptcy and strangers which the cases under the Act of 1869 decided that the Court of Bankruptcy, as then constituted, could not, or ought not to, exercise." Even so the tendency has been to follow the principles laid down in cases under the Act of 1869. In *Re Lowenthal* (q), it was said by Cave, J., that the jurisdiction under the Act of 1883 *was no greater than the jurisdiction under the Act of 1869*. Sec. 102 of the Bankruptcy Act, 1883, has been replaced by sec. 105 of the Bankruptcy Act, 1914. The following is a brief statement of the law as established by the decisions under the Bankruptcy Act, 1869, and followed in cases under the Acts of 1883 and 1914:—

(1) Every Court possessing jurisdiction in bankruptcy has full power to decide all questions arising in a bankruptcy, where the trustee claims by a higher title than the bankrupt (r), but even this jurisdiction is not exclusive (s), and in a proper case, the matter may be left to the ordinary tribunals, as where the amount at stake is a large one or questions of character are involved (s1). See paras. 62C and 612 below.

(2) Where the trustee claims only the same right as the bankrupt himself would have had, the general rule is that the Court of Bankruptcy will not exercise jurisdiction as against a stranger to the bankruptcy unless he submits to the jurisdiction (t). If a stranger to the bankruptcy is willing to submit to the Court of Bankruptcy the determination of his rights in relation to the property of the bankrupt, it is not for the trustee to object (u). Where all the parties consent, the Court of Bankruptcy will hear under sec. 105 of the Bankruptcy Act, 1914, a claim not arising out of the bankruptcy, such as a dispute in respect of title (v).

Letters Patent of the High Courts of India.

60. Letters Patent.—By clause 18 of the Letters Patent of the High Courts of Calcutta, Madras and Bombay, and by clause 16 of the Letters Patent of the High Court of Rangoon, it is provided that the Court for the

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| (p) | 13th ed., p. 393. | | 13; <i>Ex parte Price</i> (1882) 21 Ch. D. 553; <i>Re Beswick</i> (1888) 58 L.T. 591. |
| (q) | (1884) 13 Q. B. D. 238, pp. 242, 243. | (t) | <i>Ex parte Dickinson</i> (1878) 8 Ch. D. 377; <i>Ex parte Musgrave</i> (1879) 10 Ch. D. 94. |
| (r) | <i>Ex parte Brown</i> (1879) 11 Ch. D. 148. | (u) | <i>Ex parte Fletcher</i> (1878) 9 Ch. D. 381. |
| (s) | <i>Sharp v. McHenry</i> (1887) 55 L.T. 747, 749, 750; <i>Re Arnold</i> (1891) 66 L. T. 121, 123. | (v) | <i>Re Martin</i> (1912) 106 L. T. 381. Baldwin, p. 20, <i>et seq.</i> |
| (ss) | <i>Ex parte Armitage</i> (1881) 17 Ch. D. | | |

Relief of Insolvent Debtors shall be held before one of the judges of the High Court, and that the High Court and any such judge shall have, within the presidency or province, as the case may be, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the law relating to insolvent debtors in India. The words used in the Letters Patent of 1862 for the High Courts of Calcutta, Madras and Bombay were "whether within or without the presidency."

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60, 60A

It would appear from the scheme of the Letters Patent and from the language of the above clauses (w) that the High Court exercises the powers of Insolvency Courts under a special jurisdiction vested in it by the Insolvency Act, but though this jurisdiction is a special one, the High Court none the less exercises it as a part of the ordinary jurisdiction with which it is vested by law (x). See. para. 52 above.

Jurisdiction under the Presidency-towns Insolvency Act.

60A. Presidency-towns Insolvency Act, s. 7.—Sec. 7 of the Presidency-towns Insolvency Act provides *inter alia* that, subject to the provisions of the Act, the Court *shall have full power to decide all questions* which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or of making a complete distribution of property in any such case: *provided that*, unless all the parties otherwise agree, the power thereby given shall, for the purpose of deciding any question under sec. 36, be exercised only in the manner and to the extent provided in that section. This section, as has already been stated, is based on sec. 72 of the Bankruptcy Act, 1869. The proviso was added by the Presidency-towns Insolvency (Amendment) Act, 1927. The section is an enabling section. It gives jurisdiction to the Insolvency Court to decide all questions which may arise in any case of insolvency coming within its cognizance, as was done by sec. 72 of the Bankruptcy Act, 1869, subject, however, to the proviso added by the Act of 1927.

The Insolvency Court has under the first part of the section *complete jurisdiction* to decide all questions which may arise in any case of insolvency coming within its cognizance just as the Court of Bankruptcy had under sec. 72 of the Bankruptcy Act, 1869. The Court, however, is not obliged to try every question which may arise before it. The exercise of the jurisdiction is discretionary, but the discretion is governed by certain rules which have been established by decisions under

- (w) *In the matter of Candas Narrondas* (1889) 13 Bom. 520, at pp. 532, 533.
(x) *In the matter of Candas Narrondas* (1889) 13 Bom. 520; *Annode Prasad Banerjee v. Nobo Kishore Roy* (1906) 33 Cal. 560; *Re*

Chidambara Chetty (1922) 45 Mad. 31, 61 I. C. 991, ('22) A. M. 143; *Re Kancherla Krishna Rao* (1928) 51 Mad. 540, at pp. 545, 546, 112 I. C. 149, ('28) A. M. 732.

Paras. 60A, 60B sec. 72 of the Bankruptcy Act, 1869, set forth in paragraph 57A. Those rules have been followed by the Courts of Bankruptcy in England under the Bankruptcy Acts of 1883 and 1914. Summarizing those decisions, it may be said that the Court of Bankruptcy will assume jurisdiction to try claims *arising out of the bankruptcy*, where the trustee claims by a higher title than the bankrupt. Even this jurisdiction is not exclusive, and the question may, in a proper case, be left to be determined by the ordinary tribunals, as, for instance, where questions of character are involved or the amount at stake is a large one. As to *claims not arising out of the bankruptcy* the general rule is that the Court of Bankruptcy will not exercise jurisdiction as against a stranger to the bankruptcy unless he submits to its jurisdiction. The effect of the proviso to sec. 7 of the Presidency-towns Insolvency Act is that the power which the Court has under the first part of the section to decide *any* question which may arise in any case of insolvency is to be exercised in the matter of *claims not arising out of the insolvency* in the manner provided in sub-secs. (4) and (5) of sec. 36, unless all the parties otherwise agree. This is explained more fully in paras. 62A and 62B below.

The Indian decisions before the amendment may now be considered. Before doing so it may be observed that even before the amendment, the High Courts of Calcutta and Bombay followed the rule of discretion laid down in the English cases, that is to say, they assumed jurisdiction in matters arising out of the insolvency, and declined to exercise jurisdiction in matters not arising out of the insolvency. The High Court of Madras, on the other hand, assumed jurisdiction even in matter not arising out of the insolvency, not because it did not recognise that the Insolvency Court had a discretion under the section to refuse to exercise jurisdiction in such cases, but because it thought that it was in the interest of the general body of creditors that claims even of that character should be adjudicated on by the Insolvency Court. This led to considerable hardship to persons who resided at a long distance from Madras, and the legislature had to intervene in 1927 and to cut down the exercise of the jurisdiction to the extent mentioned in the proviso.

*Decisions under the Presidency-towns Insolvency Act
before the amendment of sec. 7.*

60B. Calcutta decisions.—The practice followed by the High Court of Calcutta in cases where the Official Assignee claimed against a stranger to the insolvency was, generally speaking, the same as that prevailing in England (para. 59). In a recent case, however, there was a departure from that practice (y). In that case the Official Assignee made an application

(y) *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1925) 30 C. W. N. 346, 353-354, 93 I. C.

834, ('26) A. C. 597. See also *R. v. A. F. C. Seehas* (1917) 22 C.W.N. 335, 338, 46 I. C. 196.

[apparently under sec. 36 (5)] to the Judge in Insolvency for a declaration that certain property which was claimed by the insolvent's wife as her own belonged to the insolvent, and for an order for delivery of the property to him. Before the application was made the wife was examined under sec. 36 of the Act. The Judge made the order, but it was set aside in appeal. A very learned judgment was delivered by Rankin, J. In the course of the judgment, the learned Judge said: "The ordinary course, having regard to the subject-matter and the length of time over which the investigation might have to be carried, would have been to commence a suit against the lady (the insolvent's wife) for a declaration that she was a *benamidar* for the insolvent. But under sec. 7 of the Presidency-towns Insolvency Act this Court in its insolvency jurisdiction *has jurisdiction* to determine such a point as that; just in the same way as where a person who carries on a retail business becomes an insolvent in this Court, the Court would have jurisdiction by motion in insolvency to collect debts due to the business by third parties in Tipperah or somewhere else. As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the insolvency jurisdiction and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the insolvency jurisdiction to try such a question. I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases within sec. 55 or 56 of the Presidency-towns Insolvency Act. There are many other cases. There may be cases, for example, where a property is claimed as having been taken by the opposite party from the insolvent after an available act of bankruptcy, and it can be successfully claimed if the opposite party cannot bring himself within the protective section (2). There may be cases where a transfer can be set aside if it is after an adjudication order. There are cases which come under sec. 53 of the Transfer of Property Act, where the right asserted by the Assignee is a right which belongs to creditors as such. It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvent's, is not a rule of law in the sense that the Insolvency Court has not the jurisdiction to entertain such a case and, secondly, that it is not restricted only to secs. 55 and 56. But the rule is well established if it is not rigid, and it is necessary in fairness to third parties who cannot help their creditors, debtors or *cestuis qui trustent* going insolvent, who may live far from Calcutta, and whose right may be difficult to ascertain apart from a regular suit. It is necessary also in the interests of this Court which cannot undertake in its insolvency jurisdiction to collect debts all over India or to decide on motion all classes

(2) See P.-t. I. A., s. 57; Prov. I. A., s. 55.

Paras.
60B-62

of disputes merely because an insolvent or his estate is a party." Since the amendment of sec. 7 the Official Assignee would have to file a *suit* against the wife unless she consented to the question of her title being decided by the Insolvency Court.

61. Bombay decisions.—In Bombay, it has been held that if the Official Assignee takes possession of property claimed by a stranger to the bankruptcy, and threatens to sell it as belonging to the insolvent, the stranger is entitled to bring a *suit* against the Official Assignee to establish his right to the property. He is not bound to appeal from the decision of the Official Assignee under sec. 86 of the Act (a); but if he is willing to submit to the jurisdiction of the Insolvency Court, it is not for the Official Assignee to object (b). This is in accordance with the practice obtaining in England, and it is still good law.

62. Madras decisions.—In Madras it has been held that the Insolvency Court has the power under sec. 7 of the Presidency-towns Insolvency Act to decide all questions of title between the Official Assignee and strangers to the bankruptcy, even though the latter may not consent. Consequently the Judge sitting in insolvency has the power in the insolvency of a Hindu father to determine, on the application of the Official Assignee, whether he is entitled to sell the sons' interest in the joint family property for the benefit of the father's creditors; and the decision of the Insolvency Court on the question would operate as *res judicata* and would bar a subsequent suit by the sons in respect of the same matter (c).

Of especial note are two cases which led to the simultaneous amendment of sec. 7, by adding a proviso to it, and of sec. 36 (4) and (5) of the Presidency-towns Insolvency Act. In one of these cases, that of *Abdul Khader v. The Official Assignee of Madras* (d), a "garnishee summons" was issued against the wife of the insolvent by the High Court of Madras in the exercise of its insolvency jurisdiction upon the application of the Official Assignee of Madras under sec. 7 of the Act for a declaration that certain immovable property situate outside the limits of the ordinary original civil jurisdiction of the High Court, but within the Madras presidency, belonged to the insolvent, and for an order for delivery of the title deeds of the property to the Official Assignee. The wife of the insolvent resided within the limits of the ordinary original civil jurisdiction. The allegation against her was that the property

(a) *Naginal Chunilal v. Official Assignee* (1911) 35 Bom. 473, 12 I. C. 391.

(b) *Re Rassul Haji Cassum* (1911) 13 Bom. L. R. 13, 9 I. C. 344.

(c) See *Doraiappa Iyer v. Official Assignee* (1922) 42 Mad. L.J. 141, 65 I.C. 244, (21) A. M. 456. In *Official Assignee v. Official Assignee* (1925) 70 I. C. 910, (25) A. M. 141, the Madras Court held

that if the Insolvency Court finds property of the insolvent in the possession of a purchaser with notice of fraud, to whom it has come by a fraudulent conveyance from the Official Assignee, it may hold that it has power to order such purchaser to retransfer the property to a substituted Assignee.

(d) (1917) 40 Mad. 810, 36 I. C. 524.

claimed by her was purchased by the insolvent with his own money *benami* in the name of the wife and that no interest in the property passed to her. On behalf of the wife (*garnishee*) it was contended that the property being situate outside the limits of the ordinary original civil jurisdiction, the Court had no jurisdiction, having regard to cl. 12 of the Letters Patent, to deal with the matter on an application under sec. 7 and that the only way in which the Official Assignee could enforce his claim was by a regular suit in a Civil Court having jurisdiction over the subject-matter. This contention did not prevail, and it was held that cl. 18 of the Letters Patent, which relates to insolvency matters, was not controlled by cl. 12, and that the Court had jurisdiction under sec. 7 to adjudicate on claims between the Official Assignee and strangers to the bankruptcy relating to immovable property, though such property might be situate outside the limits of the ordinary original civil jurisdiction. It was also held that sec. 7 of the Presidency-towns Insolvency Act was a counterpart of sec. 26 of the Indian Insolvent Act, 1848, and that the Insolvency Court under the Presidency-towns Insolvency Act had the same jurisdiction as that which the Insolvent Debtors Court had under sec. 26 of the Indian Insolvent Act. The decision, it is submitted, is correct, but the proposition that sec. 7 of the Presidency-towns Insolvency Act is a counterpart of sec. 26 of the Indian Insolvent Act is not correct. As pointed out by an eminent Judge of the Calcutta High Court, sec. 26 of the Indian Insolvent Act is part of an entirely different scheme and corresponds neither to sec. 7 nor to any part of sec. 36 of the Presidency-towns Insolvency Act, and the scheme of the Indian Insolvent Act related to a very different type of Court (e).

The next case is the Full Bench case of *Re Kancherla Krishna Rao* (f). The insolvent in that case was the sole agent for the Madras presidency for the sale of kerosene oil under a contract with an oil company. The registered office of the company was in Calcutta, and the contract was made in Calcutta. The insolvent had a claim against the company for damages for breach of the contract amounting to Rs. 5,00,000. The Official Assignee of Madras applied for and obtained a "*garnishee summons*" under sec. 7 of the Act claiming Rs. 5,00,000 against the company. The company did not admit the claim and contended that the company being a stranger to the bankruptcy, the Court had no jurisdiction under sec. 7 to adjudicate on the claim. It was also contended that as the company did not carry on business within the limits of the ordinary original civil jurisdiction of the Madras High Court or even within the Madras presidency, the Court had no jurisdiction to deal with the case having regard to the words "*within the presidency of Madras*" in cl. 18 of the Letters Patent (para. 60). These contentions were overruled, and it was held that cl. 18 of the

(e) *Jnanendra Balu Debi v. Official Assignee of Calcutta* (1925) 30 C. W.N. 346, at p. 354, 93 I. C. 834,

(f) (26) A.C. 597, per Rankin, J.
(1928) 51 Mad. 540, 112 I. C. 149,
(28) A.M. 732.

Paras.
62, 62A

Letters Patent was not governed by cl. 12, and that the Court had jurisdiction under sec. 7 both over persons residing outside the Madras presidency and over property situated outside the Madras presidency. As to the contention based on the words "within the presidency of Madras" in cl. 18 of the Letters Patent, the Full Bench held that those words must be deemed to limit the jurisdiction of the High Court *to cases of insolvency arising within the presidency of Madras*. In respect of this interpretation, it may be observed that the words in the corresponding cl. 17 of the Letters Patent of 1862 were "*whether within or without the presidency of Madras,*" and if the interpretation put by the Full Bench on the words "within the presidency of Madras" were correct it would follow that the High Court of Madras had, under the Letters Patent of 1862, jurisdiction in cases of insolvency *arising not only within but also without the presidency of Madras*. This is plainly impossible. Moreover, the Presidency-towns Insolvency Act is an Act not of the Imperial Legislature, but of the Indian Legislature, and it is doubtful whether the Indian Legislature could give jurisdiction to the High Court of a presidency over persons and property outside the limits of the presidency. However that may be, the decisions worked great hardship on parties residing outside the local limits of the ordinary original civil jurisdiction of the Court. Moreover, a trial of disputed questions of title as between the Official Assignee and a third person on a "garnishee summons" in insolvency could not be as satisfactory as a trial thereof in a regular suit.

62A. Amendment of sec. 7.—Commenting on the procedure followed by the High Court of Madras, the Civil Justice Committee observed that exercise of jurisdiction of this kind was "anomalous and objectionable," and recommended that "the practice [in Madras] should be restored to that obtaining in other Presidency-towns and in England" (g). This led to the amendment of sec. 7 of the Presidency-towns Insolvency Act by adding a proviso in the following terms:—

"Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under sec. 36, be exercised only in the manner and to the extent provided in that section."

The reference to sec. 36 of the Act renders it necessary to consider that section at this stage. Under sub-secs. (1) and (3) of that section, the Court has the power to summon before it any person supposed to be indebted to the insolvent or to have in his possession property belonging to the insolvent and to examine such person. Under sub-secs. (4) and (5) of that section, as they originally stood, the Court had the power, if it was *satisfied* on examination of any such person that he was indebted to the insolvent, to

order him to pay to the Official Assignee the amount due to the insolvent, and, if it was *satisfied* on the examination of any such person that he had in his possession property belonging to the insolvent, to order him to deliver the property to the Official Assignee. The question arose in several cases as to the precise power of the Court under that section. It was held in the large majority of cases that the section was intended to provide a summary procedure for ordering payment of debts due to the insolvent and delivery of property belonging to the insolvent in cases where the person examined by the Court either admitted his liability, or, even if he did not actually admit it, his evidence made it clear that he was liable to the insolvent, but that no order could be made under the section if he denied liability. There were, however, cases in which the Court, even where the liability was disputed, proceeded to inquire under that section into the claim of the Official Assignee and to examine not only the person believed to be indebted to the insolvent or to have in his possession property belonging to the insolvent, but also witnesses, and to adjudicate on the claim. One of such cases was that of *Jnanendra Bala Debi v. The Official Assignee of Calcutta (h)*. In that case the insolvent's wife was examined under sec. 36 in respect of certain property which she claimed as her own, but which, the creditors alleged, was purchased by the insolvent *benami* in her name. Some time after her examination, the Official Assignee applied, apparently under sec. 36, for a declaration that the property belonged to the insolvent and for an order for delivery of the property. The Judge in insolvency held an enquiry, and passed the order asked for by the Official Assignee. On appeal it was held that the learned Judge had no power under sec. 36 to decide disputed questions of title, and that such questions could only be disposed of either on a motion under sec. 7 or by a regular suit. To remove all doubt as to the limits of the power of the Court under sec. 36, sub-secs. (4) and (5) of that section were amended by the Presidency-towns Insolvency (Amendment) Act, 1927, by providing in effect that an order under that section for payment to the Official Assignee of money alleged to be due to the insolvent or for delivery to him of property alleged to belong to the insolvent could only be made if the person examined by the Court *admitted* that he was indebted to the insolvent or had in his possession property belonging to the insolvent. At the same time, sec. 7 of the Presidency-towns Insolvency Act was amended by adding the proviso set out above. The effect of both these amendments is that where a person examined by the Court under sec. 36 admits that he is indebted to the insolvent or that he has in his possession property belonging to the insolvent, the Court may order him to pay to the Official Assignee the amount admitted by him or to deliver to the Official Assignee the property belonging to the insolvent. If, however, he denies that he is indebted to the insolvent or that he has in his possession property belonging to the insolvent, in other words, if he denies the claim of the Official

(h) (1925) 30 C. W. N. 346, 93 I. C. 834, ('20) A. C. 597.

Para. 62A Assignee, the Court has no power under sec. 36 to adjudicate on the claim. The appropriate section of the Act under which the claim of the Official Assignee could be determined is sec. 7, but under that section also the Court cannot do so unless both the Official Assignee and the third person agree to a trial of the claim by the Judge in insolvency. If both parties do not agree, the only remedy left open to the Official Assignee is to enforce his claim by way of suit.

The proviso, however, does not apply in every case in which the claim of the Official Assignee is denied. The proviso says that “unless all the parties otherwise agree, the power hereby given shall, *for the purpose of deciding any matter arising under sec. 36*, be exercised only in the manner and to the extent provided in that section.” It is clear that no matter can arise for decision under sec. 36 unless the person against whom the claim is made has been examined under that section and denies the claim of the Official Assignee *in the course of his examination*. To attract the application of the proviso it is necessary that the third person should have been examined under sec. 36. The result is that unless the third person is examined under that section the law to be applied to the case will be the same as what it was before the amendment, and the Official Assignee may proceed by way of motion under sec. 7 to establish his claim against such party. It is believed that no such difference in procedure was intended by the legislature, and it may be that the proviso is not happily worded. Actually it was proposed at one time to draft the proviso on the lines of the proviso to sec. 105 (1) of the Bankruptcy Act, 1914 (see para. 57). That proviso, it will be seen, contains the technical expression “claims not arising out of the bankruptcy,” and this probably was the reason why the proviso to sec. 7 was drafted in its present form.

The effect of the amendment was considered in a recent case by a Full Bench of the Madras High Court (*h1*), and the following propositions were laid down :—

- (1) That sec. 7 before its amendment was not limited in its scope to matters in which the Official Assignee claims by a title higher than the insolvent, but extended also to matters in which the Official Assignee has no higher title than the insolvent himself would have had.
- (2) Where a person against whom a money demand has been made, has been examined under sec. 36, and he disputes the claim of the Official Assignee in his examination, the Judge sitting in insolvency has no power to deal with the claim in insolvency. The Official Assignee has then no option but to proceed by way of suit.

(*h1*) *Official Assignee of Madras v. Narasimha Mudaliar* (1929) 52 Ma.1. 717, (29) A.M. 705.

- (3) Where no such examination has taken place it is a matter of discretion for the Judge sitting in insolvency whether in any given case he should deal with such a claim in the Insolvency Court or refer it to the machinery of the ordinary Courts. As a general rule, in the exercise of that discretion no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims; only simple cases capable of easy and speedy proof should be so dealt with. **Paras.
62A, 62B**

It is believed that notwithstanding the Madras decision, a Judge sitting in insolvency in Calcutta or Bombay would not try money claims, however small the amount may be, but leave them to be tried by the ordinary tribunals.

62B. Summary.—The position then is this. The first part of sec. 7 applies to claims arising out of the insolvency as well as claims not arising out of the insolvency, a mere money claim.

The amendment affects only claims not arising out of the insolvency, that is, claims as to which the Official Assignee has no higher title than the insolvent himself would have had. The effect of the amendment is that where a person who is examined under sec. 36 denies any such claim, the Official Assignee can proceed against him only by way of suit; but if there has been no such examination, the Official Assignee may proceed against him by way of motion under sec. 7, and it is then a matter of discretion for the Judge sitting in insolvency as to whether he should deal with the claim in the Insolvency Court or refer the Official Assignee to a regular suit in a civil Court. •

As to claims arising out of the insolvency, where the Official Assignee claims by a higher title than the insolvent, the Judge in insolvency will continue to exercise jurisdiction as before. A claim made by the Official Assignee, by virtue of the doctrine of relation back described in sec. 51, to set aside a transfer of property by the insolvent executed between the commencement of the insolvency and the date of the order of adjudication, a claim to set aside a voluntary transfer falling within sec. 55, a claim to set aside a transfer by way of fraudulent preference falling within sec. 56, all these are claims arising out of the insolvency. As regards these claims, the Official Assignee has a higher title than the insolvent himself would have had. The insolvent himself, had he not been adjudged insolvent, could not have impeached any of these transactions. As between himself and the transferee these transactions

Para. 62B are perfectly valid. It is only if insolvency supervenes that transactions of this character are liable to be impeached by the Official Assignee. The Official Assignee alone is entitled to impeach them, and he does so by virtue of the superior and paramount title which he has by the operation of the insolvency law. The same observations apply to transfers which are in themselves acts of insolvency, such as a transfer by the insolvent for the benefit of the general body of his creditors within sec. 9 (a), or a transfer by him with intent to defeat or delay his creditors within sec. 9 (b). In the case of these transfers also the Official Assignee has a higher title than the insolvent himself would have had, and the Official Assignee may impeach them by an application to the Insolvency Court (i). There are other matters also within the proper province of the Insolvency Court. Thus a payment made by the insolvent to a creditor *after* presentation of an insolvency petition, with a view to give him preference over his other creditors, though not technically falling within sec. 56 as a fraudulent preference, may be avoided by the Official Assignee by an application in the Insolvency Court, such a payment being contrary to the policy of the insolvency law (ii). A transfer made by the insolvent after the order of adjudication can also be set aside by an application in the Insolvency Court.

Exclusive jurisdiction under P.-t. I. A.—The High Court of Madras has held that the Insolvency Court has *exclusive* jurisdiction under the Presidency-towns Insolvency Act in matters of voluntary transfers (s. 55) and fraudulent preferences (s. 56), and that no suit lies in the ordinary tribunals in respect thereof. The debtor in that case had been adjudged insolvent in Bombay. The plaintiff was the mortgagee, and the suit was brought on the mortgage against the insolvent and the Official Assignee of Bombay. On behalf of the Official Assignee it was contended that the mortgage was void as against him under sec. 55 of the Presidency-towns Insolvency Act. The High Court held, following its decisions under the Provincial Insolvency Act, that the Presidency-towns Insolvency Act gives exclusive jurisdiction to Insolvency Courts to set aside transactions under secs. 55 and 56 of the Act. It was also held that the Official Assignee cannot, even as a defendant, impeach such transactions in a civil Court, and that the proper remedy of the Official Assignee was to apply to the Insolvency Court at Bombay to set aside the mortgage under sec. 55 of the Act (j).

(i) *Ex parte Brown* (1879) 11 Ch. D. 148.

(ii) *Re Badham* (1893) 69 L.T. 356, (1893) 10 Morr. 252.

(j) *Official Assignee, Bombay v. Sundarachari* (1927) 50 Mad. 776, 102 I. C. 702, ('27) A. M. 684. See also

Jnanendra Bala Debi v. Official Assignee of Calcutta (1925) 30 C. W. N. 346, 353, 354, 93 I. C. 834, ('26) A. C. 597. See also para. 62 C.

This decision, it is submitted, is not correct. Under the English law every Court possessing jurisdiction in bankruptcy has full power to decide all questions arising in an insolvency, *e.g.*, questions of voluntary settlements and fraudulent preferences where the trustee claims by a higher title than the bankrupt, but this jurisdiction is not exclusive, and, in a proper case, the matter may be left to the ordinary tribunals as where the amount at stake is a large one or questions of character are involved (see p. 38). This principle, it is submitted, applies in British India under the Presidency-towns Insolvency Act if not also under the Provincial Insolvency Act. Reference may be made in this connection to the defences raised in the Privy Council case *Sime Darby & Co. v. Official Assignee* (1928) 30 Bom. L. R. 290, 107 I. C. 233, ('28) A. PC. 77, which were similar to those in the Madras case. It may be observed that whether the Official Assignee is the plaintiff or the defendant, a civil Court has power, where the transaction in suit is impeached either under sec. 55 or sec. 56, to stay the suit under sec. 18 (3) of the Act, whether the suit was instituted before or after adjudication (para. 269), and this, it is submitted, is the proper course to follow except in the exceptional cases mentioned above. The Insolvency Court also may stay the suit under sec. 18 (1). See para. 612 below.

**Paras.
62B, 62C**

The only ground for differentiating between the two Acts is that sec. 53 of the Provincial Insolvency Act contains the words "may be annulled by *the Court*", and sec. 54 contains the words "shall be annulled by *the Court*", the Court referred to in each section being the Court mentioned in sec. 3 of the Act, that is, the Court exercising insolvency jurisdiction. But even so, it is going too far to say that the jurisdiction of the ordinary tribunals is barred by those words within the meaning of sec. 9 of the Code of Civil Procedure, 1908. The doubt and difficulty created by those words should be removed by legislation. The best course is to bring these sections into line with the corresponding sections of the Presidency-towns Insolvency Act.

62C. Transfers within sec. 53 of the Transfer of Property Act, 1882.—In the preceding paragraph several cases have been mentioned in which the title of the Official Assignee is higher than the insolvent's. They are cases of the kind in which the Insolvency Court has invariably assumed jurisdiction. In England, however, there is no absolute binding rule that whenever the title of the Official Assignee is higher than the insolvent's, the case must be tried by the Insolvency Court (para. 59). This leads to a consideration of transfers within sec. 53 of the Transfer of Property Act, 1882. That section is based on the statute 13 Eliz.

Para. 62C c. 5 (now the Law of Property Act, 1925, sec. 172), discussed in paragraph 100B below. Sec. 53 of the Transfer of Property Act provides that every transfer of immovable property, made with intent to defeat or delay the creditors of the transferor, is voidable at the option of any creditor so defeated or delayed. The transfer is valid and binding as between the transferor and the transferee, but it is voidable at the option of the creditors. If the transferor becomes insolvent, the right to impeach the transfer vests in the Official Assignee, and this is so because the Official Assignee as representing the creditors has a higher title than that which the insolvent himself would have had. To use the language of James, L. J., in *Ex parte Butters (k)*, "The bankruptcy law puts the trustee in the position of the representative of all the creditors of the bankrupt and under the statute of Elizabeth creditors have a right to impeach transactions which the bankrupt himself could not impeach. The trustee, therefore, in seeking to set aside a transaction as fraudulent under the statute of Elizabeth, is claiming by a higher and better title than the bankrupt himself, for the bankrupt is a party to the fraud." Since the Official Assignee claims by a title higher than the insolvent's, he may impeach the transfer by an application to the Insolvency Court under sec. 7 of the Act, and the Insolvency Court will assume jurisdiction to try the claim. To this, however, there is an exception laid down by the English Courts. It has been held in England that a trustee in bankruptcy seeking to impeach a transaction under the statute of Elizabeth may proceed in a Court of Bankruptcy, but in cases in which questions affecting personal character arise or the amount at stake is large the Court should, in the absence of special circumstances, decline to exercise such jurisdiction, and should leave the question to be tried by the ordinary tribunals (l). Thus in *Ex parte Price (m)*, where the trustee sought to impeach in a County Court having bankruptcy jurisdiction a deed, whereby the debtor had conveyed to his father the equity of redemption of a farm, on the ground that it was executed by the debtor with intent to defeat and delay his creditors, it was held that the amount at stake being a large one and questions of character being involved the case was one which ought to be left to be tried in an action in the High Court in the ordinary way. In the course of the judgment Jessel, M.R., said: "In the present case an allegation of gross fraud is made against a father and his son. It is said that they conspired together.

(k) (1880) 14 Ch. D. 265, 267. See also *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1925) 830 C. W. N. 346, 354, 93 I. C. 834, ('26) A. C. 597.

(l) *Ex parte Price* (1882) 21 Ch. D. 553; *Re Beswick* (1888) 58 L. T. 591; *Ex parte Butters* (1880) 14 Ch. D. 265.

(m) (1882) 21 Ch. D. 553.

to make a sham sale to the father of the equity of redemption of property of the son in order to defraud the creditors of the son. It does not matter under what statute it is sought to set aside the transaction. Property worth nearly £500 is at stake, and questions seriously affecting character are involved. The father is not a bankrupt, and he is not directly amenable to the jurisdiction of the Court of Bankruptcy. He desires that the case should not be tried in the County Court and says that he should like to have it tried by the ordinary tribunal. He gives various reasons for this. . . . Ought we to compel him to submit to the jurisdiction of the County Court in a case in which the amount at stake is so much beyond the ordinary jurisdiction of that Court, except in bankruptcy, and in which such serious questions of character arise?" It was held that the father should not be compelled to submit to the jurisdiction of the County Court. This limitation on the exercise of jurisdiction is not confined to County Courts. The limitation applies even to the High Court (n).

Paras.
62C, 62D

62D. Time for taking objection to exercise of jurisdiction.—

The objection to the exercise by the Insolvency Court of its jurisdiction to decide questions of title as between the Official Assignee and a third person should be taken at the earliest possible opportunity. The objection will not be entertained after the third person has taken the chance of a decision in his favour on the merits in the Insolvency Court. The reason is that the objection is not one to the existence of any jurisdiction, but to the exercise of jurisdiction. In *Ex parte Swinbanks* (o) James, L.J., said: "With regard to the objection to the jurisdiction, it is very likely that if it had been taken in the first instance the Court might have said to the parties, Try the case out before the ordinary tribunals. The power given to the Court of Bankruptcy by sec. 72 [of the Bankruptcy Act, 1869] is almost without limit, because, as I have said in other cases, the Legislature trusted that Court not to exercise the jurisdiction except in a proper case. But it seems to me that when the objection was not taken in the County Court, nor before the Chief Judge, whose decision was in favour of the present respondent, it would be monstrous now to throw away all the expense which has been already incurred and to say to the parties, Fight the case out in the Chancery Division. It seems to me that it is too late now to take the objection, after the respondent has taken his chance of a decision in his favour in the Court of Bankruptcy."

(n) *Re Arnold* (1891) 66 L. T. 121, per Vaughan Williams, J. | (o) (1879) 11 Ch. D. 525, 532; *Ex parte Butlers* (1880) 14 Ch. D. 265.

Paras.
62E, 63

62E. Limitation.—The Indian Limitation Act, 1908, applies to an application under sec. 7 of the Presidency-towns Insolvency Act, just as to a suit, service of notice of the application being equivalent to the commencement of the suit (p).

Power to decide questions arising in insolvency under the Provincial Insolvency Act, 1920.

63. Provincial Insolvency Act, 1920, sec. 4.—There was no section in the Provincial Insolvency Act, 1907, corresponding to sec. 7 of the Presidency-towns Insolvency Act. This gave rise to a conflict of decisions whether a Provincial Insolvency Court had the power to decide questions of title between the Receiver and a stranger to the insolvency or whether such questions could only be decided by a suit filed in the ordinary tribunal. These questions arose principally in cases where a sale or a mortgage or a lease was made by the insolvent more than two years before his insolvency, and the transaction was impeached by the Receiver as fraudulent. The transaction being more than two years old, it could not be set aside under sec. 53 of the Provincial Insolvency Act. The Receiver therefore sought by an application to set it aside as being fraudulent under sec. 53 of the Transfer of Property Act, 1882. The application was not made under any section of the Provincial Insolvency Act, for there was no express section relating to it, but under what was called the implied power of the Insolvency Court. The High Court of Allahabad held that a Provincial Insolvency Court had the power to decide the question on an application by the Receiver (q). In the Allahabad case a transfer executed by the insolvent of his property was impeached by the Receiver as being fictitious and the Receiver applied to be put in possession of the property. It was contended on behalf of the transferee that the District Judge exercising insolvency jurisdiction could not decide questions relating to the validity of transactions entered into by the insolvent and that such questions could only be tried in a regular suit. These contentions did not prevail, and it was held that the Insolvency Court had the power to try and decide those questions. In the course of the judgment it was said: "The learned vakil for the appellant contends that if the case does not come within sec. 36 of the Act, the Receiver should be left to bring a separate suit. We cannot accept this contention. It is true that the Indian Provincial Insolvency Act contains no such provision as sec. 102 of the English Bankruptcy Act, 1883. . . . But it is the duty of a receiver appointed under the Indian Act, and of the Court itself, where no receiver is appointed, to take possession of the property of the insolvent,

(p) See *Re Mansel* (1892) 66 L.T. 245.
(q) *Banidhar v. Kharagjit* (1915)

37 All. 65, 26 I.C. 926.

and sec. 18 (3) of the Act [Provincial Insolvency Act, 1920, sec. 56 (3)] empowers the Court, where it appoints a receiver, to remove any person in whose possession or custody any property of the insolvent is from the possession or custody thereof, provided of course that the insolvent had a right to remove him." The High Court of Calcutta, dissenting from the Allahabad High Court, held that it had no such power and that questions of title to property should be decided in a separate suit (r). In the Calcutta case also the transaction was impeached as *benami*. As to sec. 18 (3) of the Provincial Insolvency Act, 1907, the Court said that the clause was not intended to authorise the removal of any person whom the insolvent himself could not remove without the aid of legal proceedings. The clause, it was said, was intended to cover the removal of an agent or *gomashta* subject to the terms of his appointment, or the removal of a tenant subject to the conditions of his lease, but not the removal of a person in possession claiming adversely to the insolvent. To put an end to this conflict the legislature introduced sec. 4 while enacting the Provincial Insolvency Act, 1920. In so doing it adopted the view of the Allahabad Court in preference to that of the Calcutta Court. Sec. 4 is in almost the same terms as sec. 7 of the Presidency-towns Insolvency Act as it stood before its amendment. The word "title," which does not occur in sec. 7 of the Presidency-towns Insolvency Act, is used in sec. 4 of the Provincial Insolvency Act, to give prominence to the Allahabad view that a Provincial Insolvency Court has the power to decide questions of title between the Receiver and third persons (rr).

Decisions under sec. 4 of the Provincial Insolvency Act, 1920.

64. Exclusive jurisdiction under Prov. I. A.—It has been held in a series of cases that the Insolvency Court alone has jurisdiction to adjudicate on the validity or otherwise of transfers falling within secs. 53 and 54 of the Provincial Insolvency Act, and that the ordinary tribunals have no jurisdiction to entertain suits to set aside such transfers (s). Sec. 53 relates to voluntary transfers and sec. 54 to transfers by way of fraudulent preference. See p. 48 above, "Exclusive jurisdiction."

(r) *Nilmoni Chowdhuri v. Durga Charan Chowdhri* (1918) 22 C. W. N. 704, 46 I. C. 377; *Joy Chandra Das v. Mahomed Amir* (1918) 22 C. W. N. 702, 44 I. C. 143.

(rr) See *Fool Kumari Dasi v. Khirod Chandra Das Gupta* (1927) 31 C.W.N. 502, 504-505, 102 I. C. 115, ('27) A. C. 474.

(s) *Official Receiver v. Palaniswami Chetti* (1925) 48 Mad. 750, 757, 88 I. C. 934 ('25) A. M. 1061.

[Prov. I. A., s. 53]; *Shahzada Begam v. Gokul Chand* (1927) 2 Luck. 651, 105 I. C. 50, ('27) A. O. 357 [Prov. I. A., s. 53]; *Kaniz Fatima v. Narain Singh* (1927) 49 All. 71, 98 I. C. 1001, ('27) A. A. 66 [Prov. I. A., s. 53]; *Mariappa Pillai v. Raman Chettiyyar* (1919) 42 Mad. 322, 52 I. C. 519 [Prov. I. A. 1907, s. 36]; see also *Shikri Prasad v. Aziz Ali* (1922) 44 All. 71, 72, 63 I. C. 601, ('22) A.A. 196.

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65, 66

65. Suits by third persons to recover property attached by Receiver.—It has been held by the High Court of Allahabad that a person who is aggrieved by any act or decision of the Receiver has two courses open to him. He may appeal from the decision of the Receiver under sec. 68 of the Provincial Insolvency Act, or he may, if he pleases, treat the Receiver as a trespasser and bring a suit in the ordinary tribunal. He is not bound to appeal to the Insolvency Court. Nor is leave of that Court necessary as a condition precedent for bringing the suit. Thus if property claimed by a third person is attached by the Receiver as belonging to the insolvent, such person may appeal to the Insolvency Court, and apply for a declaration of his title and for possession, or he may file a suit for that purpose (t). If, however, he elects to appeal to the Insolvency Court, and the case is decided, the decision will operate, as *res judicata* under sec. 4 (2) of the Act, and will bar a subsequent suit in respect of the same matter (u). If the Insolvency Court decides against him, his only remedy is by way of appeal under sec. 75 of the Act, but if it refuses to adjudicate upon his claim, there being then no decision, he may file a suit in a civil Court (v). It has also been held that where property attached by the Receiver is claimed by two rival claimants, and the Insolvency Court decides that the property does not belong to the insolvent, and also decides incidentally that it belongs to one of the two claimants, the decision does not operate as *res judicata* as between the claimants (w). All the above decisions are in accordance with the English law.

66. Fictitious transfers and transfers fraudulent within sec. 53 of the Transfer of Property Act, 1882.—Sec. 53 of the Provincial Insolvency Act provides that a transfer of property *not being a transfer in favour of a purchaser or incumbrancer in good faith and for valuable consideration* shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the Receiver.

It has been held by the High Courts of Allahabad, Madras and Calcutta that the Insolvency Court has the power to decide whether a transfer of property made by the insolvent even though more than two years before his insolvency was *fictitious*. It has also been held that the Insolvency Court has the power to decide whether a transfer made by the insolvent even though more than two years before his insolvency is voidable as being *fraudulent*

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| <p>(t) <i>Maharana Kunwar v. E. V. David</i> (1924) 46 All. 16, 77 I. C. 57, ('24) A. A. 40. See the Code of Civil Procedure, 1908, s. 9.</p> <p>(u) <i>Maharana Kunwar v. E. V. David</i> (1924) 46 All. 16, 21, 77 I. C. 57, ('24) A. A. 40; <i>Basra Begam v. Babu Sheo Narain</i> ('23) A. A. 293, 71 I. C. 983; <i>Raj Rani v. Jawahir Lal</i> (1928) 26 All. L. J. 93, 108 I. C. 152, ('28) A. A. 159;</p> | <p><i>Shib Narain v. Lachmi Narain</i> (1929) 119 I. C. 733, ('29) A. L. 761. See also <i>Pita Ram v. Jujhar Singh</i> (1917) 39 All. 626, 43 I. C. 573, and <i>Irshad Husain v. Gopi Nath</i> (1919) 41 All. 378, 49 I. C. 590, both cases under s. 22 of Prov. I. A., 1907.</p> <p>(v) <i>Deorao v. Vithal</i> ('25) A. N. 363, 87 I. C. 1000.</p> <p>(w) <i>Hukumut Rai v. Padam Narain</i> (1917) 39 All. 353, 38 I. C. 151.</p> |
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within the meaning of sec. 53 of the Transfer of Property Act, 1882 (x). It is submitted as to the former class of transfers that the question as to their validity should be left to be decided by the ordinary tribunals, unless the parties consent to the question being decided by the Insolvency Court (x2). As to the latter class of transfers, see para. 62 C above.

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66-68**

67. Hindu sons.—The High Court of Madras has held that the Insolvency Court has the power in the insolvency of a Hindu father to try, on the application of the Receiver, the question whether the son's interest in joint family property is liable to be sold for the benefit of the father's creditors, even if the son does not consent to the question being tried by that Court (y). It is true that the Insolvency Court has that power, but, it is submitted, it should refuse to exercise it in cases of this kind and leave the question to be decided by the ordinary tribunals.

68. Purchaser from Receiver.—In cases which arose under the Provincial Insolvency Act, 1907, the High Court of Madras held that where property is sold by the Receiver as belonging to the insolvent, and the purchaser while attempting to take possession is obstructed by a third person who claims to be in possession as owner, the Insolvency Court has no power to order possession to be given to the purchaser, the ground of the decision being that the Court had no power under that Act to decide questions of title with respect to property claimed by third persons (z). In a case under the Provincial Insolvency Act, 1920, the same High Court held that the new sec. 4 gave power to the Insolvency Court to decide questions of title and that the Court had power under secs. 4 and 56, on the application of the Receiver or even of the purchaser, to direct the third party to deliver possession to the purchaser (a). The same High Court has, however, held that although the Receiver, on the insolvency of a Hindu father, can sell the whole joint family property including the son's share therein, the purchaser from the Receiver is not entitled to apply under sec. 4 for delivery of possession of the whole property including the son's share, and that his only remedy is by way of suit; but the Receiver or the purchaser is entitled, in so far as the insolvent's share is concerned, to joint possession of the property on an application under that section (aa). This, it is submitted, is a correct exposition of the law. Once the property is sold the sale proceeds have to be distributed amongst the creditors, and it cannot be said that the question whether the purchaser is entitled to possession is one which it is expedient

- (x) *Haji Anwar Khan v. Mohammad Khan* (1929) 51 All. 550, 113 I.C. 819; *Shikri Prasad v. Aziz Ali* (1922) 44 All. 71, 63 I.C. 601, ('22) A. A. 196; *Hari Chand Rai v. Moti Ram* (1926) 48 All. 414, 94 I.C. 429, ('26) A. A. 470; *Chittammal v. Ponnuswami Naicker* (1926) 49 Mad. 762, 92 I.C. 573, ('26) A.M. 363; *Fool Kumari Dasi v. Khirood Chandra Das Gupta* (1927) 31 C. W. N. 502, 102 I.C. 115, ('27) A.C. 474.

- (x2) See *Fool Kumari Dasi v. Khirood Chandra Das Gupta* (1927) 31 C. W. N. 502, 102 I.C. 115, ('27) A.

C. 474.

- (y) See *Ramasamyajulu v. Official Receiver* ('26) A. M. 360, 92 I. C. 249. See also *Venkatram v. Chokkier* (1928) 51 Mad. 567, 109 I. C. 516, ('28) A.M. 531, and para. 68 below.
- (z) *Narasimhaya v. Veeraraghavulu* (1918) 41 Mad. 440, 42 I.C. 525.
- (a) *Ramaswami Chettiar v. Ramaswami Iyenjar* (1922) 45 Mad. 434, 65 I. C. 394, ('22) A. M. 147. The purchaser was held entitled to apply under s. 56 (3).
- (aa) *Venkatram v. Chokkier* (1928) 51 Mad. 567, 109 I. C. 516, ('28) A. M. 531.

Paras. 68-70A or necessary to decide "for the purpose of making a complete distribution of property" within the meaning of sec. 4 of the Act (b).

68A. Suggestion for amending Provincial Insolvency Act, sec. 4.—It is indeed difficult to understand why the Legislature, while amending sec. 7 of the Presidency-towns Insolvency Act, did not amend at the same time sec. 4 of the Provincial Insolvency Act. Sec. 7 was amended on the recommendation of the Civil Justice Committee. Referring to the decisions of the Madras High Court under the Presidency-towns Insolvency Act, the Committee said (c): "We think it anomalous, however, that this view should be taken by one Court alone; and if, now that the Provincial Insolvency Act, sec. 4, contains the same provisions in substance as are contained in sec. 7 [of the Presidency-towns Insolvency Act], this practice is to spread, it will produce the most serious disadvantages, and much dislocation of our legal system." There is no doubt that the Provincial Insolvency Courts have in some cases gone too far, and assumed jurisdiction in cases where they ought to have declined it. It would be desirable, if the Provincial Insolvency Act is to remain as a separate Act on the statute book, to bring sec. 4 of that Act into line with sec. 7 of the Presidency-towns Insolvency Act.

69. Res judicata [sec. 4 (2)].—Subject to the right of appeal under sec. 75 of the Provincial Insolvency Act, every decision under sec. 4 of that Act is final and binding for all purposes as between, on the one hand the debtor and the debtor's estate and on the other hand, all claimants against him or it and all persons claiming through or under them or any of them. See para. 65 above, "Suits by third persons to recover property attached by Receiver."

70. Power of Court to sell disputed interest [sec. 4 (3)].—Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sec. 4 (1) of the Provincial Insolvency Act, but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit. The question of title between the person claiming the property and the purchaser from the Court should then be determined in a suit in a civil Court.

70A. Procedure under Provincial Insolvency Act, sec. 4.—A Court exercising jurisdiction under sec. 4 of the Provincial Insolvency Act should follow the procedure of a civil Court in a civil suit. It should require the Receiver and the party in possession to state their respective cases in writing, and should frame issues, and should give the party an opportunity of producing evidence as in a regular suit (d). There should be sworn testimony and the same care should be used with regard to the admission and rejection of documentary evidence as in a suit (e).

(b) See *Re Arnold* (1891) 66 L. T. 121, where the Bankruptcy Court declined to exercise jurisdiction under somewhat similar circumstances.

(c) Civil Justice Committee's Report, 1924-25, at p. 242.

(d) *Ransidhar v. Kharagjit* (1915) 37 All. 65, 26 I. C. 926; *Re Ghani Muhammad* ('28) A. L. 556, 108 I. C. 602.

(e) *Shikri Prasad v. Aziz Ali* (1922) 44 All. 71, 73, 63 I. C. 601, ('22) A. A. 196.

2.—GENERAL POWERS OF COURTS AND PROCEDURE.

A. *Presidency-towns Insolvency Act, s. 90.*

71. General powers of Court (s. 90).—“(1) In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction :

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Provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act.

(2) Subject to the provisions of this Act and rules, the costs of and incidental to any proceedings in the Court shall be in the discretion of the Court.

(3) The Court may at any time adjourn any proceedings before it upon such terms, if any, as it thinks fit to impose.

(4) The Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it thinks fit to impose.

(5) Where by this Act or by rules, the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any as the Court thinks fit to impose.

(6) Subject to rules, the Court may in any matter take the whole or any part of the evidence either *viva voce* or by interrogatories, or upon affidavit, or by commission.

(7) For the purpose of approving a composition or scheme by joint debtors the Court may, if it thinks fit, and on the report of the Official Assignee that it is expedient so to do, dispense with the public examination of one of the joint debtors if he is unavoidably prevented from attending the examination by illness or absence abroad.

(8) For the purposes of this Act the Court of the Judicial Commissioner of Sind shall have all the powers to punish for contempt of Court which are possessed by the High Courts of Judicature at Fort William, Madras and Bombay respectively.”

72. Transfer of proceedings.—Sec. 24 of the Code of Civil Procedure, 1908, provides that the High Court may transfer any proceeding pending before it for trial to a subordinate competent Court, and withdraw any proceeding pending in a subordinate Court and itself try and dispose of the same. The powers given to the Insolvency Court under sec. 90 of this Act are only such as are exercised by the High Court in its ordinary original civil jurisdiction, and the power of transfer or withdrawal of proceedings from Courts subordinate to the High Court under sec. 24 of the Code is not

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one of such powers. Moreover, the jurisdiction conferred by the Presidency-towns Insolvency Act and that conferred by the Provincial Insolvency Act are distinct and the provisions of the two Acts differ in several important respects. The Insolvency Court, therefore, has no power under sec. 90 to transfer to itself an insolvency proceeding pending in a District Court (f), nor has it any such power under sec. 5 (2) of the Provincial Insolvency Act (ff). Further, the Insolvency Court has no power to transfer any insolvency proceeding pending before it to a District Court (g).

73. Stay of proceedings.—Before the Presidency-towns Insolvency Act was amended by the Insolvency (Amendment) Act, 1930, it was held that the Insolvency Court had no power to stay *insolvency* proceedings pending in a District Court (h). Since the amendment it has such power : see new sec. 18A.

74. Injunction.—Though the Court will not restrain a mortgagee or other secured creditor in the exercise of his legal remedies under sec. 18 of the Act, it may, it seems, restrain him under O. 39, r. 1, of the Code of Civil Procedure, 1908, if there are substantial grounds for impeaching his title (i).

75. Section does not affect jurisdiction of the Court.—This section does not curtail the jurisdiction otherwise exercisable by the Insolvency Court (j).

75A. Where special procedure is prescribed.—See para. 77 below.

B. Provincial Insolvency Act, s. 5.

76. General powers of Court (s. 5).—(1) Subject to the provisions of the Provincial Insolvency Act, the Court, in regard to proceedings in insolvency, has the same powers and is required to follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under the Provincial Insolvency Act in Courts subordinate to

(f) *Re Naginlal Maganlal* (1925) 49 Bom. 788, 91 I.C. 160, ('25) A. B. 543. See also *Re Maneckchand* (1923) 47 Bom. 275, 280, 75 I. C. 61, ('22) A. B. 390.

(ff) *Oomer Ahmad Bros., In the matter of* (1926) 4 Rang. 554, 100 I. C. 265, ('27) A. R. 105.

(g) *Srinivasa Aiyangar v. Official Assignee* (1915) 38 Mad. 472, 21 I. C. 77.

(h) *M. A. Sassoon and Sons, Ltd. v. Gosto Behari Das* (1927) 31 C. W. N. 847, 103 I. C. 754, ('27) A.C. 629; *Re Naginlal Maganlal* (1925) 49

Bom. 788, 794, 91 I.C. 160, ('25) A. B. 543; *Sarat Chandra Pal v. Barlow & Co.* (1928) 56 Cal. 712, ('28) A. C. 782.

(i) *Ex parte Bayly* (1880) 15 Ch. D. 223.

(j) *Abdul Khader v. The Official Assignee of Madras* (1917) 40 Mad. 810, 36 I. C. 524; *In the matter of L. W. Nasse* (1929) 7 Rang. 201, 118 I. C. 615, ('29) A. R. 229; *Re Dinaram Somani* (1917) 27 C. W. N. 370, 82 I. C. 70, ('23) A.C. 427.

them, have the same powers and are required to follow the same procedure as they have and follow in regard to civil suits.

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77. Where special procedure is prescribed by the Act.—Where the Act prescribes an express remedy, it is not open to a party to resort to the general provisions of the Code of Civil Procedure, 1908. Thus a debtor whose adjudication has been annulled under sec. 43 (1) of the Act owing to his failure to appear at the hearing of his application for discharge, can apply only under sec. 10 (2) of the Act, and not under O. 9, r. 9, of the Code (*k*).

78. Transfer of proceedings.—The High Court in the exercise of its original insolvency jurisdiction has no power under sec. 5 (2) of the Provincial Insolvency Act to transfer to itself an insolvency proceeding pending in a District Court (*l*). See para. 72 above.

79. Injunction restraining sale.—After an insolvency petition has been presented, a Provincial Insolvency Court has the power, even before adjudication, to restrain a creditor by an injunction under O. 39, r. 1, of the Code of Civil Procedure, 1908, from selling the debtor's goods on which he claims a lien, where the lien is denied by the other creditors (*m*). *A fortiori* it has the power to restrain a secured creditor from selling the goods after adjudication (*n*).

(*k*) *Venugopalachariar v. Chunnilal* (1926) 49 Mad. 935, 937, 97 I. C. 706, ('26) A. M. 942.

(*l*) *Omer Ahmad Bros., In the matter of* (1926) 4 Rang. 554, 100 I.C. 265, ('27) A. R. 105; *Goculdoss Junnadosh & Co. v. Sadasivier* (1929) 52 Mad. 57, ('28) A. M. 1091.

(*m*) *Hajee Ally Mahomed v. M. M. Bham* (1928) 6 Rang. 352, 111 I. C. 908, ('28) A. R. 241.

(*n*) *Luxmi Industrial Bank, Ltd. v. Dinesh Chandra Roy* (1928) 55 Cal. 1053, 113 I. C. 105, ('28) A. C. 609.

3.—COURTS TO BE AUXILIARY TO EACH OTHER.

Para. 80 **80.** Courts to be auxiliary to each other [P.-t. I. A., s. 126; Prov. I. A., s. 77].—By sec. 126 of the Presidency-towns Insolvency Act, it is enacted that all Courts having jurisdiction under this Act shall make such orders and do such things as may be necessary to give effect to sec. 118 of the Bankruptcy Act, 1883, and to sec. 50 of the Provincial Insolvency Act, 1907.

By sec. 77 of the Provincial Insolvency Act, 1920, which is a reproduction of sec. 50 of the Act of 1907, it is provided that all Courts having jurisdiction in insolvency and the officers of such Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters, within their respective jurisdictions.

Sec. 118 of the Bankruptcy Act, 1883, referred to above, now Bankruptcy Act, 1914, sec. 122, is as follows:—

“The High Court, the County Courts, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court, to exercise, in regard to the matters directed by the order, such jurisdiction as either the Court which made the request, or the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.”

The Indian Insolvency Act, 1848, which was repealed by the Presidency-towns Insolvency Act, was an Imperial Statute. Under sec. 7 of that Act the property of the insolvent “whether within the territories within the limits of the charter of the East India Company or without” vested in the Official Assignee. That Act operated throughout the British dominions, and a vesting order made under it operated as a statutory transfer of all the property of the insolvent within British India. It also operated as a transfer both of movable and immovable property within the British Empire outside British India, subject, in the case of immovable property, to the carrying out of any formalities requisite under the local law in respect of conveyances or assignments of property. Thus if by the law of the colony in which the immovable property is situate, registration is necessary to pass the title, the title of the

Official Assignee is not complete until registration. But the vesting order could not operate so as to effect of itself a transfer of the insolvent's property outside the British Empire (o). **Para.**

The Presidency-towns Insolvency Act, however, is an Act of the Indian legislature, and, consequently, it can operate only in British India. Therefore, though the Act provides that on the making of an order of adjudication the property of the insolvent *wherever situate* vests in the Official Assignee (p), the order, it is conceived, cannot operate as a transfer of immovable property within the British Empire outside British India, and as to immovable property in a foreign country it would certainly not be effective unless specially recognized by the law of that country. It is not to be supposed that the framers of the Act were not aware of this limitation to its scope. The whole question was fully considered, and the words "wherever situate" were added in the section to give to an order of adjudication made by Courts under the Presidency-towns Insolvency Act the widest possible effect (q).

Though the vesting order may not operate so as to effect of itself a transfer of the insolvent's immovable property outside British India, the Courts of this country are to treat such property as the property, not of the insolvent, but of the Official Assignee. They can compel the insolvent, if he is personally within the jurisdiction of the Court, to execute a transfer of such property according to the form required by the law of the place where such property is situate and if the insolvent fails to do so, he may be committed for contempt (r). If the immovable property is situated in the British Empire, as, for instance, in England, the Official Assignee can apply under sec. 122 of the Bankruptcy Act, 1914, to the Court of Bankruptcy in England for an order in aid to enable him to realize such property (s). Such an order would be made as a matter of course, but the title of the Official Assignee in such cases would commence from the date of the order of the English Court of Bankruptcy. Sec. 122 of the Bankruptcy Act, 1914, has effect throughout the British Empire, and every British Court acting in insolvency is bound to give effect to the orders of every other British Court in bankruptcy matters. Sec. 126 of the Presidency-towns Insolvency Act enacts that Indian Courts shall do what is necessary to give effect to sec. 118 of the Bankruptcy Act, 1883, now sec. 122 of the Bankruptcy Act, 1914.

The Courts having jurisdiction under the Presidency-towns Insolvency Act are to act in aid of and be auxiliary to each other in all matters of

(o) *Ex parte Rogers* (1881) 16 Ch. D. 665, per Jessel, M. R., at p. 666; *Calendar Sykes & Co. v. Colonial Secretary* (1891) A. C. 460, 466-468.

(p) P.-t. I. A., s. 17.

(q) These words did not occur in the Bill as drafted.

(r) P.-t. I. A., s. 33 (2) (d), (4).

(s) *Re Levy's Trusts* (1885) 30 Ch. D. 119.

Paras. 80, 81 insolvency. Similarly by sec. 77 of the Provincial Insolvency Act all Courts having jurisdiction in insolvency are to act in aid of and be auxiliary to each other. But no Court has power to refer a matter over which it has full jurisdiction to another Court. The sections were enacted to enable one Court to assist another in dealing with matters which were within the jurisdiction of the Court asked to act, but not to enable a matter proper to be dealt with by the requesting Court to be sent for trial to another Court (*t*). Further, the only Court which can be requested to act in aid of another Court must be a Court having insolvency jurisdiction (*u*).

81. Orders in aid.—The English Court of Bankruptcy may on the adjudication of a British subject in England make an order under sec. 122 of the Bankruptcy Act, 1914, seeking aid of the High Court of Calcutta in its insolvency jurisdiction with a request to the latter Court to direct the Official Assignee of Calcutta to deliver to the Official Receiver the assets of the bankrupt which came into his hands on the bankrupt's subsequent insolvency in Calcutta (*v*). Similarly, the High Court of Bombay may make an order seeking aid of the Consular Court at Shanghai for obtaining possession of movables belonging to the insolvent at Shanghai (*w*). The High Court of Calcutta may make an order requesting the District Court at Delhi to act under sec. 77 of the Provincial Insolvency Act and to make over to the Calcutta Court property of the insolvent in the custody of the Delhi Court (*x*). In one case where the insolvent was adjudicated at Dacca, and an application was made to set aside a transfer executed by him of his property at Monghyr to a person who also resided at Monghyr, and the witnesses lived in different and distant places, the High Court of Calcutta held that the proper course for the District Court of Dacca was to act under sec. 77 of the Provincial Insolvency Act, and to request the District Court of Bhagulpur to act in aid of that Court and to examine the witnesses, Bhagulpur being the place most convenient to all the parties (*y*).

An order under sec. 122 of the Bankruptcy Act, 1914, made by the English Court of Bankruptcy seeking the aid of the High Court of Calcutta does not entitle the trustee in bankruptcy to apply for and obtain from the latter Court an order for the examination of a witness in Calcutta. Such an order can be made only by the Court in England under sec. 25 of the Bankruptcy Act, 1914 (*z*). Where some of the partners of a firm files their petition in insolvency in Calcutta and others have been

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| (<i>t</i>) <i>Re Huntly</i> (1917) 2 K. B. 1917. | 78, 18 I. C. 908. |
| (<i>u</i>) <i>Callender Sykes & Co. v. Colonial Secretary</i> (1891) A. C. 460. | (<i>y</i>) <i>Lalji Sahai Sing v. Abdul Gani</i> (1910) 15 C. W. N. 253, 7 I. C. 765 ;
<i>Sheikh Abdul Rezak v. Basiruddin Ahmed</i> (1912) 17 C.W.N. 405, 14 I. C. 980. |
| (<i>v</i>) See <i>In the matter of William Watson</i> (1904) 31 Cal. 761, 779-781. | (<i>z</i>) <i>Re L. King & Co.</i> (1911) 38 Cal. 542, 12 I. C. 14. |
| (<i>w</i>) <i>Re Naoroji Sorabji Talati</i> (1909) 33 Bom. 462, 467, 3 I. C. 987. | |
| (<i>x</i>) <i>Re Jewandas Jhwar</i> (1913) 40 Cal. | |

adjudicated bankrupt in England, and in the insolvency proceedings in Calcutta an order is made that such proceedings are to be in aid of and auxiliary to the bankruptcy proceedings, the trustee in bankruptcy has no *locus standi* to oppose the personal discharge of the insolvents in the Calcutta Court. Opposition to a discharge is not a proceeding for carrying out the order in aid. The Court, however, may order the public examination of the insolvent for the purpose of aiding the Court in England (a). **Para. 81**

(a) *In the matter of Isaac Shrager* (1906) 33 Cal. 1060.

LECTURE III.

WHO MAY BE ADJUDGED INSOLVENT.

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82. Jurisdiction to make adjudication order.—The jurisdiction of the Insolvency Courts in British India to make an order adjudging a person an insolvent is conferred by two Acts of the Indian Legislature, namely, the Presidency-towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920. The order of adjudication may be made on a petition presented either by a creditor or by the debtor. The Insolvency Courts, however, have no power to adjudicate any person an insolvent, unless—

- (1) he is a “debtor”; and
- (2) he has committed an “act of insolvency” as defined in the Acts (a).

Insolvency is a very serious matter. It alters the status of the person who is adjudged insolvent. It is therefore the duty of the Court to see that both these conditions are satisfied before it admits an insolvency petition.

This Lecture is confined to a consideration of the meaning of the term “debtor” as used in the Insolvency Acts. Acts of insolvency, which are the very foundation of the jurisdiction of the Insolvency Court, are dealt with in the next Lecture.

83. Debtor.—The expression “debtor” is not used in the Insolvency Acts in its popular sense. It has a limited meaning and includes only persons who are subject, either by birth and natural allegiance, or by temporary residence, to the laws of British India. It does not mean a debtor all the world over; it means only a debtor who is subject to the laws of British India (b).

84. Foreigners.—A foreigner cannot be adjudged insolvent by a Court of British India unless the act of insolvency was committed by him during his personal residence in British India. If the act was committed during his personal residence, it is not necessary that he should be personally present in British India at the time of the presentation of the petition against him. It is the act of insolvency, and not the petition, which gives jurisdiction to the Court (c). These propositions are based on decisions under the Bankruptcy Acts of 1869 and 1883. The principle of these decisions

(a) P.-t. I. A., s. 9; Prov. I. A., s. 6.

(b) See *Re Pearson* (1892) 2 Q.B. 263, 268; *Cooke v. Charles A. Vogeler Co.* (1901) A. C. 102, 110. There was no definition of the word “debtor” in the B.A. of 1883 upon which the two Insolvency Acts are based. “Debtor” is now defined in s. 1 (2) of the

B.A. of 1914.

(c) *Ex parte Crispin* (1873) L.R. 8 Ch. App. 374; *Ex parte Blain* (1879) 12 Ch. D. 522; *Re Pearson* (1892) 2 Q. B. 263; *Re A. B. & Co.* (1900) 1 Q. B. 541; *Cooke v. Charles A. Vogeler Co.* (1901) A. C. 102.

applies to cases under the Indian Acts. The English decisions are based on two fundamental rules (*d*). Para. 84

The first rule is "that all legislation is *prima facie* territorial, that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time being bring themselves within the allegiance of the legislating power" (*e*). The whole question is governed by the broad, general, universal principle that English legislation, *unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute*, is applicable only to English subjects, or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction (*f*). "Bankruptcy is a very serious matter. It alters the status of the bankrupt. This cannot be overlooked or forgotten when we are dealing with foreigners, who are not subject to our jurisdiction. What authority or right has the Court to alter in this way the status of foreigners who are not subject to our jurisdiction? *If Parliament had conferred this power in express words, then, of course, the Court would be bound to exercise it*" (*g*). In *Cooke v. Charles A. Vogeler Company* (*h*), Lord Halsbury said: "I think the judgments of James, L.J., and Sir George Mellish lay down a broad substantial rule in dealing with such questions, which I should be sorry to see departed from. English legislation is *prima facie* territorial, and it is no departure from that principle to say that a foreigner coming to this country and trading here, and here committing an act of bankruptcy, is subject to our laws and to all the incidents which those laws enact in such a case; while he is here, while he is trading, even if not actually domiciled, he is liable to be made a bankrupt like a native citizen. And so, an Englishman by reason of his nationality is subject to the laws of his Sovereign wherever he may be. But the territoriality, so to speak, of the bankruptcy law is by necessary inference imported into both the Acts [that is the Bankruptcy Acts of 1869 and 1883] to which I have referred, by the generality of its phrases. The words 'debtor' and 'creditor' certainly cannot be sufficient to give jurisdiction to the English Court of Bankruptcy, because, if unlimited, they would give jurisdiction all over the world in respect of debts, petitions, or acts of bankruptcy committed anywhere; and it is a familiar maxim of the law, *Extra territorium jus dicenti non impune paretur*."

Both the Presidency-towns Insolvency Act and Provincial Insolvency Act are based on the Bankruptcy Act, 1883. The principles stated above were laid down in cases decided under that Act and the Bankruptcy Act,

- (*d*) The English law was altered to some extent in 1913. The alteration was made by ss. 8 and 9 of the B.A., 1913, now reproduced in s. 1 (2) and s. 4 (1)(*d*) of the B.A. of 1914.
(*e*) *Ex parte Blain* (1879) 12 Ch. D.

- 522, 528.
(*f*) (1879) 12 Ch. D. 522, 526, *supra*.
(*g*) *Re A. B. & Co.* (1900) 1 Q. B. 541, 544.
(*h*) (1901) A. C. 102, 107-108.

Para. 84 1869. It follows from what is stated above that a British Indian Court has no jurisdiction to make an order of adjudication against a foreigner resident abroad who, without coming into the jurisdiction, has in this country had a place of business, contracted debts and acquired assets, and has executed *outside* British India a deed transferring the whole of his property for the benefit of his creditors (i). The execution of the deed without doubt is an act of insolvency under the law of British India, but the debtor being a foreigner and the act having been committed abroad, he is not subject to the insolvency law of British India. On the other hand, a foreigner domiciled abroad, who comes to British India and contracts debts in British India, is liable to be adjudged insolvent in British India, if he commits an act of insolvency in British India, although he may have left British India before the petition for adjudication is presented (j). He cannot be adjudged insolvent upon an alleged act of insolvency committed outside British India (j).

The second rule is that the act of bankruptcy must be a personal act and cannot be committed by the act of an *agent* which the debtor has not authorised and of which he has no cognizance (k). This principle also applies in British India so far as foreigners are concerned, and its application as regards foreigners is not affected by the Explanation to sec. 9 of the Presidency-towns Insolvency Act and sec. 6 of the Provincial Insolvency Act (l). That Explanation says that an act of insolvency may be committed by an agent even though the agent have no specific authority to commit it. The Explanation is to be read with the word "debtor" in that section, and "debtor" in that section means a person subject to the insolvency law of British India and does not include a foreigner unless the act of insolvency was committed by him during his personal residence in British India. In the case, therefore, of a foreigner no order of adjudication can be made against him by a Court of British India on an act of insolvency committed by his agent, unless the act was authorized by him, or unless the agent occupied such a position that his principal must stand or fall by his acts as in *Kasturchand v. Dhanpat Singh* (m).

It has been stated above that Parliament may in express words confer jurisdiction on the Bankruptcy Courts of England to adjudge a foreigner a bankrupt. This has now been done to a certain extent by the Bankruptcy Act, 1914, the material provisions being those contained in sec. 1 (2) and sec. 4 (1) (d) of the Act. Sec. 1 (2) is in these terms: "In this Act, the expression 'a debtor,' unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him (a) was personally present in England, or (b) ordinarily resided or had a place of residence in England, (c) or was carrying

(i) (1901) A. C. 102, *supra*.

(j) (1873) L. R. 8 Ch. App. 374, *supra*.

(k) *Ex parte Blain* (1879) 12 Ch. D. 522.

(l) See *Muthu Chettiar v. Nagindas*

(1926) 28 Bom. L. R. 680, 98

I. C. 431, ('26) A. B. 383.

(m) (1896) 22 I. A. 162, 23 Cal. 26.

on business in England personally or by means of an agent or manager, **Para. 84** or (d) was a member of a firm or partnership which carried on business in England." Sec. 4 (1) (d) of the Bankruptcy Act, 1914, is in terms almost similar to those of sec. 11 of the Presidency-towns Insolvency Act.

Sec. 11 of the Presidency-towns Insolvency Act provides that the Court has no jurisdiction to make an order of adjudication unless *inter alia* the debtor "carries on business either in person or through an agent" within the jurisdiction. It has been said in a Sind case that the words "either in person or through an agent" were introduced in the section for the purpose of removing a doubt which might otherwise have existed as to the jurisdiction of the Insolvency Court over foreigners carrying on business within the jurisdiction of the Court by the employment of agents. In support of this view reliance was placed upon the provisions of sec. 4 (1) (d) of the Bankruptcy Act, 1914, which are practically identical with those of sec. 11 of the Presidency-towns Insolvency Act, and it was said that the provisions both of the Presidency-towns Insolvency Act and of the Bankruptcy Act, 1914, had the same meaning and conferred jurisdiction over all debtors including foreigners who carried on business through an agent within the jurisdiction (n). This view, it is submitted, is not correct. It is a mistake to suppose that any jurisdiction over foreigners is conferred by the provisions of sec. 4 (1) (d). It is conferred by sec. 1 (2) of the Act, which confines for the first time a definition of "debtor." A "debtor" under that section may be a British or even a non-British subject. Sec. 4 (1) (d) does not come into operation unless there is a "debtor" within the scope of sec. 1 (2). Before sec. 4 (1) (d) can be applied, it must be determined whether the person sought to be adjudged bankrupt is a "debtor" within the meaning of sec. 1 (2), that is, a person capable of committing an act of bankruptcy. The capacity to commit an act of bankruptcy is to be measured by sec. 1 (2) and not by sec. 4 (1) (d) of that Act (o).

If the words "carries on business either in person or through an agent" in sec. 11 of the Presidency-towns Insolvency Act were intended to confer jurisdiction over a foreigner carrying on business within the jurisdiction through an agent, the Explanation to sec. 9 of the Act which says that for the purposes of that section the act of an agent may be the act of a principal would be superfluous. Moreover, the Explanation does not say that an act of insolvency committed by an agent is in every case the act of the principal. What it says is that it *may be* an act of the principal. The words "may be" at once suggest a limitation, being the one indicated in the Privy Council case of *Kasturchand v. Dhanpat Singh* (ol). This limitation would not have been introduced if the words "carries on business

(n) *Re Reloomal Tolaram* (29) A. S. 24, 112 I. C. 134.

(o) See *Re Pearson* (1892) 2 Q. B. 263; *Re Clarke* (1896) 2 Q. B. 476. See

also Williams on Bankruptcy, 13th ed., pp. 36 and 50.
(ol) (1896) 22 I. A. 162, 23 Cal. 26. See para. 136.

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either in person or through an agent" in sec. 11 of the Presidency-towns Insolvency Act were intended to confer jurisdiction over a foreigner carrying on business in British India through an agent. Sec. 11 of the Presidency-towns Insolvency Act defines merely the local jurisdiction of Insolvency Courts. It merely indicates the Court to which an insolvency petition should be presented. Before that stage is reached, the primary condition that the debtor has the capacity to commit the act of insolvency alleged against him must be satisfied. The capacity to commit an act of insolvency is not governed by sec. 11. That is a matter upon which the Indian Acts are silent, and it is to be determined with reference to the English law as it stood at the date when those Acts were passed. The precise operation of sec. 11 in the case of foreigners is as follows :

A foreigner may commit an act of insolvency in British India, and consequently be a "debtor" for the purposes of the Act. This, however, does not by itself entitle a creditor to present an insolvency petition against him. To entitle him to present a petition the debtor must have, in cases governed by the Presidency-towns Insolvency Act, ordinarily resided or carried on business within the local limits of the ordinary original civil jurisdiction of the Court within a year before the date of the presentation of the petition, or some one of the other conditions laid down in sec. 11 must have been complied with. The result is that a creditor cannot present a petition against a debtor merely because the debtor has committed an act of insolvency while present on a passing visit in British India (p).

85. Minors.—In India a minor is absolutely incompetent to contract. Therefore agreements by minors for the repayment of money lent or for goods supplied are absolutely void (p1). Where, however, necessaries are supplied to a minor, the person who furnishes such supplies is entitled to be reimbursed from the property of the minor; but the minor does not incur any personal liability to pay for the necessaries (q). Further since a minor's agreement is absolutely void, there can be no question of his ratifying it on attaining majority (r).

It follows from what is stated above that a minor cannot under any circumstances be adjudged insolvent either on his own petition (s) or on the petition of a creditor (t), even though the debt was contracted in the

(p) See Dicey, Conflict of Laws, Rule 69.

(p1) Indian Contract Act, 1872, s. 11; *Mohori Bibee v. Dhurmodas Ghose* (1903) 30 I. A. 114, 30 Cal. 539. As to the English law, see the Infants' Relief Act, 1874.

(q) Indian Contract Act, 1872, s. 68. As to the English law, see Sale of Goods Act, 1893, s. 2.

(r) *Arumugan v. Duraisinga* (1914) 37 Mad. 38, 12 I. C. 568.

(s) *Re Hansraj Malji* (1883) 7 Bom. 411; *Re A. and M.* (1926) 1 Ch. 274.

(t) *Ex parte Jones* (1881) 18 Ch. D. 109; *Sanyasi Charan Mandal v. Krishnaddhan Bunerjee* (1922) 49 I. A. 108, 49 Cal. 560, 67 I. C. 124, ('22) A. P. C. 237; *Sanyasi Charan Mandal v. Asutosh Ghose* (1915) 42 Cal. 225, 26 I. C. 836; *Re Nobodeep Chunder Shaw* (1886) 13 Cal. 68; *Re Sital Prasad* (1916) 43 Cal. 1157, 37 I. C. 663; *Jagmohan Narain v. Grish Babu* (1920) 42 All. 515, 58 I. C. 557; *Re Hiralal Shiv Narain* ('27) A.S. 18, 97 I. C. 446.

course of a trade carried on by him. The fact that he fraudulently makes a representation that he is of full age does not, it seems, make any difference (u). Also since a minor's agreement cannot be ratified, he cannot be adjudged insolvent in respect of a debt contracted by him during his minority and purporting to be ratified by him after he has come of age (v). If a minor is adjudged insolvent, the adjudication must be annulled (w).

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As to necessities it is enacted in England by sec. 2 of the Sale of Goods Act, 1893, that where necessities are sold and delivered to an infant, he must pay a reasonable price therefor. The liability to pay is a personal one, and it is an open question in England whether a minor can be made a bankrupt in respect of a debt incurred for necessities (x). In India the liability to pay for necessities is not personal, and it seems that a minor cannot be adjudged insolvent in respect even of such a debt (y).

86. Minor partner [P.-t. I. A., s. 99 (2)].—A minor, being incompetent to contract, cannot become a partner by contract. He may, however, be admitted to the benefits of partnership in which case his "share" in the property of the firm is liable for the debts of the firm, but he cannot be made personally liable for such debts. The "share" which is liable for the debts of the firm is his share in the property of the firm after its obligations have been satisfied (z). The share may be ascertained by the Insolvency Court. It is not necessary that it should be determined in a suit (a).

Since a minor cannot be adjudged insolvent, it follows that where a firm consists of adult and minor partners, the adult partners alone can be adjudged insolvent, but not the minor partners. If in such a case an adjudication order is sought against the firm itself, it will not be made against the firm, but it will be against the firm other than the minor partners (b). In either case on the making of the order of adjudication all the property of the firm will vest in the Official Assignee or Receiver including the minor's share, and if any part of it has passed improperly into the possession of the minor, the right to recover it is in the Official Assignee or

(u) See *Mahomed Syedol Ariffin v. Yeod Ooi* (1916) 43 I. A. 256, 263-264, 39 I. C. 401 P. C. following *Leslie v. Shiell* (1914) 3 K. B. 607.

(v) *Ex parte Kibble* (1875) L. R. 10 Ch. App. 373.

(w) *Jagmohan Narain v. Griah Babu* (1920) 42 All. 515, 58 I. C. 557.

(x) *Re Soltykoff* (1891) 1 Q. B. 413.

(y) See *Re Sital Prasad* (1916) 43 Cal. 1157, 37 I. C. 663.

(z) Indian Contract Act, 1872, s. 247; *Sanyasi Charan Mandal v. Krishnadhan Banerji* (1922) 49 I. A. 108, 49 Cal. 560, 67 I. C. 124, ('22) A. PC. 237.

(a) Lindley on Partnership, 9th ed., pp. 800, 801; *Re Hiralal Shiv Narain* ('27) A. S. 18, 22, 97 I. C. 446.

(b) *Lowell Christmas v. Beauchamp* (1894) A. C. 607; *Re Hansraj Malji* (1883) 7 Bom. 411; *Sanyasi Charan v. Asutosh Ghosh* (1915) 42 Cal. 225, 26 I. C. 836; *Re Sital Prasad* (1916) 43 Cal. 1157, 37 I. C. 663; *Jagmohan Narain v. Griah Babu* (1920) 42 All. 515, 58 I. C. 557; *Re Hiralal Shiv Narain* ('27) A. S. 18, 97 I. C. 446.

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Receiver (c). The same principles apply to a joint Hindu family firm containing minor partners (d). See para. 91 below.

87. Married women.—In England a single woman or a widow has always been held to be subject to the bankruptcy law, but the case of a married woman stands on a different footing. As a general rule, a married woman could not, by the common law, make binding contracts, or at law possess or dispose of personal estate, and, therefore, could not be made bankrupt. At common law a woman could not during marriage legally enter into any contract without the authority of her husband, and no action could be maintained upon such a contract against her or her husband. If during marriage she entered into a contract without the authority of her husband, there was no remedy in respect of it; if she entered into a contract with his authority, it was his contract and he alone could be sued upon it. An important alteration in the law was made by the Married Women's Property Act, 1882. By that Act it was provided that a married woman could acquire, hold and dispose of property as a *feme sole*, and could enter into contracts affecting her separate property, and could sue and be sued as a *feme sole* in respect of such property, without joining her husband. Further, a married woman carrying on a trade *separately from her husband* was, in respect of her separate property, made subject to the bankruptcy law as if she were a *feme sole* (e). By the Bankruptcy Act, 1914, it is now provided that every married woman who carries on a trade or business, *whether separately from her husband or not*, shall be subject to the bankruptcy laws as if she were a *feme sole* (f). A woman not engaged in trade or business may by marriage put herself out of the reach of the Bankruptcy Court. In one case the debtor was sued while a single woman and judgment was obtained against her. She committed an act of bankruptcy and a petition in bankruptcy was presented against her. When the petition came on for hearing, she promised to settle the demand, and prevailed on the Registrar to adjourn the case till March 3. She married on March 2, and thereby deprived the Court of power to make her bankrupt (g).

The provisions of the Indian Insolvency Act, 1848, were extended by sec. 63 of that Act to married women. That section has been omitted both in the Presidency-towns Insolvency Act and the Provincial Insolvency Act. The provisions of the enactments referred to below rendered its inclusion unnecessary. The first of these enactments was the Indian Succession Act, 1865. By sec. 4 of that Act it was enacted that "no person shall, by marriage, acquire any interest in the property of the person whom he or she marries

(c) *Sanyasi Charan Mandal v. Krishnadhan Banerji* (1922) 49 I. A. 108, 49 Cal. 560, 67 I. C. 124, (22) A. PC. 237 [Dayabhaga case].

(d) See *Sanyasi Charan v. Asutosh* (1915) 42 Cal. 225, 26 I. C. 836; *Sanyasi Charan Mandal v. Krish-*

nadhan Banerji (1922) 49 I. A. 108, 49 Cal. 560, 67 I. C. 124, (22) A. PC. 237.

(e) Ss. 1, 2 and 5.

(f) S. 125 (1).

(g) *Re A Debtor* (1898) 2 Q. B. 576.

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or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried." This provision has been replaced by sec. 20 of the Indian Succession Act, 1925. Sec. 4 of the Act of 1865 did not apply to any marriage, one or both of the parties to which professed at the time of the marriage the Hindu, Mahomedan, Buddhist, Sikh or Jain religion; nor does sec. 20 of the Act of 1925 apply to such a marriage. All women subject to the Indian Succession Act are absolute owners of property vested in or acquired by them, and their husbands do not by their marriage acquire any interest in such property (h). Further, it is enacted by the Married Women's Property Act, 1882, that the wages and earnings of a married woman in any employment, occupation or trade carried on by her and not by her husband, and also any money or other property so acquired by her through the exercise of any literary, artistic or scientific skill, are to be deemed to be her separate property (i). Sec. 7 of the Act enables a married woman to sue in her own name in respect of her separate property as if she were unmarried. Sec. 8 renders her liable to be sued on a contract entered into with her by a person with reference to her separate property, as if she were unmarried, but her liability is limited to such property (j). By sec. 9 it is provided that a husband, married after the 31st day of December 1865, is not by reason only of such marriage liable for the debts of his wife contracted before marriage, but the wife is liable to be sued for, and is, to the extent of her separate property, liable to satisfy such debts as if she had continued unmarried. This Act also does not apply to any married woman who at the time of her marriage professed the Hindu, Mahomedan, Buddhist, Sikh or Jain religion, or whose husband at the time of such marriage professed any such religion. This, however, does not mean that a Hindu or a Mahomedan married woman cannot enter into contracts affecting her separate property, or that if she does so, her separate property is not liable for debts contracted by her. It is well established that a Hindu married woman may contract, but her liability will be limited to her *stridhana* (k). The result is that in India a married woman possessing separate property may be adjudged insolvent in respect of debts contracted by her, even though she may be a Hindu or Mahomedan.

88. Lunatics.—A lunatic cannot commit an act of insolvency which involves intent, *e.g.*, a transfer of his property *with intent* to defeat his creditors, or a departure from his dwelling house with similar intent, but he may, it seems, be adjudged insolvent when he has contracted the debt and

(h) A Hindu husband, under the Hindu law, is entitled to take the *sau-dayikastridhana* of his wife "in case of distress or during illness."

(i) S. 4.

(j) As to the form of the decree to be passed against a married woman,

see *Scott v. Morley* (1887) 20 Q. B. D. 120, 132.

(k) *Govindji v. Lakmidas* (1880) 4 Bom. 318; *Narotam v. Nanka* (1882) 6 Bom. 473; *Re the Petition of Radhi* (1888) 12 Bom. 228.

Paras. 88-90 committed an act of insolvency whilst sane (l). In England where a person is found lunatic by inquisition, and an act of bankruptcy is suffered after the inquisition, as where the lunatic's property in the hands of the committee appointed by the Court in Lunacy has been sold in execution of a decree against the lunatic, the Court in Lunacy will give leave to the committee in the name of the lunatic to consent to an adjudication in bankruptcy against the lunatic (m), or to present a bankruptcy petition under the Bankruptcy Act (n), if it is for the benefit of the lunatic to do so. The same principles, it seems, would apply in India (o).

89. Joint debtors.—A creditor is entitled to present a single petition against two or more joint debtors provided some act of insolvency has been committed by each of them. That act may be a joint act, and where a joint act of insolvency is relied upon, it must be shown to be the act of all (p). Thus if a creditor obtains a decree against three persons jointly, and property jointly belonging to them has remained under attachment for a period of not less than 21 days, the creditor may present a single insolvency petition against them all. But if the property belongs only to two of them, the third cannot be adjudged insolvent, for he having no interest in the property, the attachment is not an act of insolvency as against him (q). In a Calcutta case (r) it was held that a single petition cannot in any case be presented against several joint debtors, but this, it is submitted, is not good law. See paras. 90 and 91 below.

90. Partners: Firm [P.-t. I. A., s. 99; Prov. I. A., s. 79 (2) (c)].—A creditor is entitled to present a separate petition against any one member of a firm without including the others (s). He is also entitled to present a joint petition against two or more of them. In order to sustain a joint petition against two or more partners it is necessary that some act of insolvency should have been committed by each of them. This may be a joint act of insolvency; but it is not requisite that they should have committed a joint act of insolvency or that they should all have committed an act of insolvency of the same kind. In order to support a joint petition against all the members of a firm, the act of

(l) *Anon* (1807) 13 Ves. 590, 33 E. R. 415.

(m) *Re Lee* (1883) 23 Ch. D. 216; See also *Ex parte Cahen* (1879) L. R. 10 Ch. D. 183; *Re Farnham* (1895) 2 Ch. 799, s.c. (1896) 1 Ch. 836.

(n) *Re James* (1884) 12 Q. B. D. 332.

(o) As to Rules under the P.-t. I. A., see Bom. Rule 159, and Cal. Rule 156.

(p) *Ex parte Clarke* (1832) 1 D. and Ch. 544, cited in Williams on Bankruptcy, 13th Ed.,

p. 186; *Maung Kay Oh v. S. M. A. L. Arnuchallam Chetty* (1924) 2 Rang. 309, 84 I. C. 968, ('25) A. R. 36.

(q) *Harish Chandra Mukherjee v. The East India Coal Co., Ltd.* (1912) 16 Cal. W. N. 733, 14 I. C. 576 (a case of partners).

(r) *Kali Charan Saha v. Hari Mohan Basak* (1919) 24 C.W.N. 461, 58 I. C. 531.

(s) See P.-t. I. A., s. 95.

insolvency must have been committed during the continuance of a joint debt, and the petition must be founded on a joint debt (t). **Para. 90**

If two persons, *A* and *B*, carry on business in the firm name of *A.B. & Co.*, and debts are incurred by the firm, they are both liable to be adjudged insolvent even if one of them is not in fact a partner. It is, however, necessary that the person denying his status as a partner should have held himself out as a partner to the world and not merely to a small number of the creditors of the firm (u). If he has held himself out as a partner to a small number only, he will be personally liable to them, but he cannot be treated as a partner for any purpose whatever of administration in insolvency (v).

According to the English law the act of bankruptcy must be a personal act. No act of bankruptcy, therefore, could be committed by a firm as such, and no adjudication can be made against a firm in the firm name; it can only be made against the partners individually (w). Under the Presidency-towns Insolvency Act (sec. 99), however, an adjudication order may be made against a firm in the firm name (x), and such an order operates as if it were an order made against each of the persons 'who at the date of the order was a partner in the firm (y). To support an adjudication *against a firm* each of the partners must have committed some act of insolvency. If a joint act of insolvency is relied upon, it must be shown to be the act of all. Thus where one partner who resides at the place of business of the firm and is the only partner who transacts the business, the others residing at a distance, stops payment and departs from the place of business, it is not evidence of a joint act of insolvency and on such evidence no order of adjudication can be made against

(t) *Puniah v. Kesarmal* (1927) 50 Mad. 256, 99 I. C. 185, ('27) A. M. 124; *Ex parte Clarke* (1832) 1 D. and Ch. 544, cited in Williams on Bankruptcy, 13th ed., p. 183; *Mills v. Bennett* (1814) 2 M. & S. 556, 105 E. R. 488; *Hogg v. Bridges* (1818) 8 Taunt. 203, 129 E. R. 460; *Ex parte Manor* (1815) 19 Ves. 543, 34 E. R. 616.

(u) *Ex parte Hayman* (1878) 8 Ch. D. 11, 23; *Re Rowland and Crankshaw* (1866) L. R. 1 Ch. App. 421.

(v) *Ex parte Sheen* (1877) 6 Ch. D. 235.

(w) *Ex parte Blain* (1879) 12 Ch. D. 522; Bankruptcy Rules 285 and 288. But a firm can now commit an act of bankruptcy in England by non-compliance with a bankruptcy notice founded on a judgment against the firm, and by virtue of sec. 119 of the Bankruptcy Act, 1914, can have a

receiving order made against it as a firm. The adjudication, however, must be made against the partners individually, and not against the firm in the firm name.

(x) *Gokuldoss Goverdhan Doss v. Parry & Co.* (1925) 48 Mad. 795, 91 I. C. 127, ('25) A. M. 1249. See *Brown v. Carbery* (1864) 16 C. B. (N. S.) 2, 143 E. R. 1023.

(y) See Rules made under P.-t. I. A.—Calcutta Rule 151, Bombay Rule 154. In Madras it is provided by Rule 47 that "an order of adjudication shall be made *against the partners individually*." But this, it has been held, does not mean that an order of adjudication cannot be made against a firm, and that if the rule does mean it, it is ultra vires: *Gokuldoss Goverdhan Doss v. Parry & Co.* (1925) 48 Mad. 795, 91 I. C. 127, ('25) A. M. 1249.

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the firm (z). An adjudication order may be made against a firm, though the firm is dissolved, if the debts of the firm have not been paid (a), provided that the act or acts of insolvency have been done during the continuance of a joint debt or debts, though they may have been done after dissolution (b). Where a person carries on business in the name of a firm, a petition may be presented against him also in the name of the firm. See para. 137 below.

Where a petition is presented against two or more partners in the name of the firm, or where it is presented against a person in the name of the firm in which he carries on business, the Court may, on application by any person interested, order the names of the persons who are partners in the firm, or the name of the person carrying on business under a partnership name, to be disclosed in such manner and verified on oath or otherwise as the Court may direct.

There is no provision in the Provincial Insolvency Act, corresponding to sec. 11 (d) and sec. 99 of the Presidency-towns Insolvency Act. Sec. 79 (2)(c), however, of the Provincial Insolvency Act provides for rules being made by the High Court as to the procedure to be followed where the debtor is a firm. This assumes that an adjudication order can be made under the latter Act against a firm in the firm name, and rules in fact have been made under that Act regulating such procedure (c). There was no provision even as to rule-making in the corresponding section (sec. 51) of the Provincial Insolvency Act, 1907. It was accordingly held in a Calcutta case under that Act that an order of adjudication could not be made against a firm in the firm name (d). Under the Act of 1920 it has been held that such an order can be made (e). It is not clear whether the provision for making rules in sec. 79 (2) (c) of the Provincial Insolvency Act lets in by implication, in cases under the Provincial Insolvency Act, the provisions of law relating to the adjudication of partners and of firms under the Presidency-towns Insolvency Act. In any case it is desirable to reproduce those provisions in the Provincial Insolvency Act.

91. Joint Hindu family.—The members of a joint Hindu family may be adjudged insolvent on a single petition by a creditor, if they are personally

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| <p>(z) <i>Mills v. Bennett</i> (1814) 2 M. & S. 556, 105 E. R. 488; <i>Gopal Naidu v. Mohanlal Kanyalal</i> (1926) 49 Mad. 189, 91 I. C. 874, ('26) A. M. 206.</p> <p>(a) <i>Gokuldoss Goverdhandoss v. Parry & Co.</i> (1925) 48 Mad. 795, 91 I. C. 127, ('25) A. M. 1249.</p> <p>(b) <i>Ex parte Clarke</i> (1832) 1 D. & Ch. 544, cited in Williams on Bank-</p> | <p>ruptey, 13th ed., p. 186.</p> <p>(c) Calcutta Rules, 19 to 27; Allahabad Rules, 22 to 30; Bombay Rule XXVIII.</p> <p>(d) <i>Kali Charan Saha v. Hari Mohan Basak</i> (1919) 24 C. W. N. 461, 58 I. C. 531.</p> <p>(e) <i>Mohammad Umar v. Official Receiver</i> ('29) A. L. 447.</p> |
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liable on a joint debt and have committed a joint act of insolvency, as, for instance, a joint transfer of family property in favour of a creditor by way of fraudulent preference (f). The test is whether if the petition were treated as a suit, the suit would be bad for misjoinder of causes of action and defendants. If the suit would not be bad on that ground, a single petition for adjudication is maintainable. It is submitted that a single petition can also be presented even if an act of insolvency is separately committed by each of them, as where each member departs from the dwelling-house with intent to defeat or delay the creditors of the family, provided it is done during the continuance of a joint debt or debts. In a Calcutta case (g), it was held, following an earlier decision of the same High Court (h) under sec. 344 of the Code of Civil Procedure, 1882, that a declaration of insolvency cannot be asked for in one petition against joint debtors. This decision, it is submitted, is not good law.

Where the business of a joint Hindu family is carried on by the manager of the family and debts are contracted by him in the course of the business, the other members are not *personally* liable for the debts and they cannot therefore be adjudged insolvent in respect of those debts, unless they render themselves personally liable by taking an active part in the business or otherwise (i). It does not make any difference that the family consists of father and sons and that under the Hindu law the sons are liable for the father's debts. If the father contracts a debt in the course of the business and he dies, and a decree is obtained by the creditor against the sons limited to the assets of the family in their hands, the sons cannot be adjudged insolvent in respect of that debt, they not being personally liable for the debt (j). If the under-mentioned case (k) lays down any proposition to the contrary, it is not good law. A minor member of a joint Hindu family can in no case be adjudged insolvent. Even if he takes an active part in the joint family business after attaining majority, he cannot be adjudged insolvent in respect of business debts contracted during his minority (l). See para. 86 above.

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| <p>(f) <i>Manayya v. K. R. Rice Mill Co.</i> (1921) 44 Mad. 810, 63 I. C. 916, ('21) A. M. 294; <i>Muthu Veerappa v. Sivagurunatha</i> (1926) 49 Mad. 217, at p. 218, 92 I. C. 603, ('26) A. M. 133; <i>Paras Ram v. Amir Chand</i> (1928) 10 Lah. L. J. 207, 109 I. C. 464, ('28) A. L. 354, where the debt was not a joint debt.</p> <p>(g) <i>Kali Charan Saha v. Hari Mohan Basak</i> (1919) 24 Cal. W. N. 461, 58 I. C. 531.</p> <p>(h) <i>Sarada Prosad Ukil v. Ram Sukh</i></p> | <p><i>Chandra</i> (1905) 2 Cal. L. J. 318.</p> <p>(i) <i>Nagasubrahmaniam Mudaliar v. Krishnamachariar</i> (1927) 50 Mad. 981, 986, 104 I. C. 642, ('27) A. M. 922.</p> <p>(j) (1927) 50 Mad. 981, 104 I. C. 642, ('27) A. M. 922, <i>supra</i>.</p> <p>(k) <i>Muthu Veerappa Chettiar v. Sivagurunatha Pillai</i> (1926) 49 Mad. 217, 92 I. C. 603, ('26) A. M. 133.</p> <p>(l) <i>Official Assignee of Madras v. Palaniappa Chetty</i> (1918) 41 Mad. 824, 49 I. C. 220.</p> |
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A joint Hindu family firm is not a "firm" in the sense in which that word is used in the law of partnership. Therefore, no insolvency petition can be presented against a Hindu joint family firm as such. A petition can only be presented against the members of the joint family; but they must be adults (*m*).

92. Corporate and registered companies.—No insolvency petition can be presented against any corporation or against any association or company registered under any enactment for the time being in force (*n*). Companies are wound up under the Indian Companies Act, 1913.

93. Traders and non-traders.—Prior to the Bankruptcy Act, 1861, no person could be adjudged bankrupt unless he was a trader. Sec. 65 of the Bankruptcy Act, 1849, contained an enumeration of traders, and they alone were liable to bankruptcy. The list included apothecaries, auctioneers, bankers, brokers, millers, bleachers, carpenters and persons who made their living by buying and selling goods or commodities. Non-traders were excluded from the Bankruptcy Court, and a special Court called the "Court for the Relief of Insolvent Debtors" was instituted for their benefit. Relief was granted by that Court to insolvent debtors from the liability to imprisonment on surrender of their property; but their after-acquired property remained liable to the creditors unless they could either arrange with all their creditors or obtain a sufficient majority to bind the minority to a compromise with the sanction of the Court of Bankruptcy under the provisions of the statute 7 and 8 Vict. c. 70 (*o*). The Bankruptcy Act, 1861, made all debtors, whether traders or non-traders liable to bankruptcy, and abolished the Court for the Relief of Insolvent Debtors, and repealed the enactments relating thereto. But the Act still preserved certain distinctions between traders and non-traders, and certain acts of bankruptcy were confined to traders only. The Bankruptcy Act, 1883, abolished all distinction between traders and non-traders, except as to certain matters which apply only to traders.

(*m*) See *Sanyasi Charan Mandal v. Krishnanadhan Banerji* (1922) 49 I. A. 108, 49 Cal. 560, 67 I. C. 124, ('22) A. PC. 237.

(*n*) P.-t. I. A., s. 107; Prov. I. A., s. 8.
(*o*) See 1 and 2 Vict. c. 110; 5 and 6 Vict. c. 116; 7 and 8 Vict. c. 96.

The Indian Insolvency Act, 1848, made a distinction between traders and non-traders (*p*), but the distinction has now been abolished except as to certain incidents of insolvency which apply only to traders. One of them is the doctrine of reputed ownership (*q*). Another relates to the insolvent's discharge, as where being a trader he has omitted to keep books of account or continued to trade after knowing himself to be insolvent (*r*). **Para. 93**

(<i>p</i>) See ss. 8 and 9 as to acts of insolvency, and s. 60 as to discharge.	I. A., s. 23 (3).
(<i>q</i>) P.-t. I. A., s. 52 (2) (c); Prov.	(<i>r</i>) P.-t. I. A., s. 39 (2) (b) and (c) Prov. I. A., 42 (1) (b) and (c).

LECTURE IV.

ACTS OF INSOLVENCY.

(P-t. I. A., s. 9 ; Prov. I. A., s. 6.)

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94. Origin and object of acts of insolvency.—It has been stated in Lecture IV that a person cannot be adjudged insolvent unless he is a “debtor” within the meaning of the insolvency law and has committed an act of insolvency. Both these lie at the very basis of the insolvency jurisdiction of Courts. A debtor, we have seen, is a person subject to the insolvency law of British India. An act of insolvency is something done or suffered by a debtor which gives the Court jurisdiction to make an order of adjudication. One of the principal objects of the insolvency law is to distribute the debtor's property among the creditors in the most expeditious and economic manner. It is, therefore, of great importance that an insolvent debtor should be brought under the operation of law as soon as possible after his affairs have become embarrassed ; and for this reason certain acts have been prescribed as *indicia of insolvency*. These acts are called acts of insolvency, and no person can be made an insolvent unless he has committed one of such acts. But immediately upon his committing an act of insolvency a debtor becomes liable to be adjudged insolvent (h).

The earliest specification in the English statute law of acts of bankruptcy is to be found in 13 Eliz. c. 7, and this has been added to and varied by subsequent statutes. The acts which now constitute acts of bankruptcy in England are specified in sec. 1 of the Bankruptcy Act, 1914. In India they are specified in the Presidency-towns Insolvency Act, sec. 9, and the Provincial Insolvency Act, sec. 6.

95. Acts of insolvency.—The acts of insolvency enumerated in the Presidency-towns Insolvency Act, sec. 9, are the same as those mentioned in the Provincial Insolvency Act, sec. 6. It is enacted by those sections that a debtor commits an act of insolvency in each of the following cases, namely :—

- (a) if, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally ;
- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors ;
- (c) if, in British India or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent ;

- (d) if, with intent to defeat or delay his creditors,—
 - (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling house or usual place of business or otherwise absents himself,
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him ;
- (e) if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money : [the words “ or attached for a period of not less than twenty-one days ” do not occur in the Provincial Insolvency Act] ;
- (f) if he petitions to be adjudged an insolvent ;
- (g) if he gives notice to any of his creditors that he has suspended or that he is about to suspend, payments of his debts ;
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation.—The act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act. [The words “ even though the agent have no specific authority to commit the act,” do not occur in the Provincial Insolvency Act, but this does not make any difference.]

(a) *Transfer for benefit of creditors generally.*

[*P.-I. I. A.*, s. 9 (a) ; *Prov. I. A.*, s. 6 (a)].

96. Transfer for benefit of creditors generally.—A debtor commits an act of insolvency if, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally. A transfer for the benefit of creditors generally, though it was not expressly mentioned in the Bankruptcy Acts prior to the Act of 1869, was always treated as an act of bankruptcy, the reason being that the transferor thereby deprived himself of the power of carrying on his trade, and endeavoured to put his property into a course of distribution among his creditors different from that which would take place under the bankruptcy law and without the safeguards which that law provides (i). A transfer for the benefit of creditors generally was first expressly mentioned as an act of bankruptcy by the Bankruptcy Act, 1869, sec. 1 (2). In order that a transfer for the benefit of creditors may be an act of insolvency, it is necessary that the transfer must be for the benefit of all the creditors, and not a particular class of creditors. A transfer by a debtor for the benefit of his trade creditors only is not an act of insolvency under clause (a), though it may amount to a fraudulent transfer under clause (b) or a fraudulent preference under clause (c) of the section (j). A

(i) *Re Spackman* (1890) 24 Q.B. D. 728,
738 ; *Re Wood* (1872) L. R. 7 Ch.
App. 302 ; *In the matter of Bri-*

mohan Dobay (1897) 2 C. W. N.
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(j) *Re Phillips* (1900) 2 Q. B. 329.

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composition deed whereby the debtor transfers his property to trustees for the benefit of such of his creditors as may sign it within a specified period is a transfer for the benefit of creditors generally, and as such an act of insolvency (k). The transfer again must be of the whole or substantially the whole property of the debtor (l). For a transfer under this clause to constitute an act of insolvency it is not necessary to prove an intent to defeat or delay creditors as it is in clause (b); such a transfer has always been deemed in itself to have that effect (m).

For a transfer for the benefit of creditors to constitute an act of insolvency there must be an operative transfer of all or substantially all the debtor's property so as to put it out of his power to deal with it (n); and, further, the transfer must be to "a third person." A mere declaration of trust by the debtor, or a mere agreement by him that his property shall be dealt with for the benefit of his creditors (o), or a mere letter by the debtor to a third person authorising him to realise his property and hold the proceeds for the benefit of his creditors (p), is not such a transfer as is contemplated by the section, and does not constitute an act of insolvency.

97. Act of insolvency committed abroad.—The words "or elsewhere" coupled with the words "or remains out of British India" in clause (d) (i), show that a transfer of his property by a debtor for the benefit of his creditors *executed outside British India* may be an act of insolvency, in other words, that an act of insolvency may be committed abroad. In that case, however, the debtor must be a British subject domiciled in British India, and the transfer must be intended to operate according to the law of British India (q). A transfer executed by a foreigner, who has never been in this country and has himself personally done no act within the jurisdiction of the Insolvency Courts of British India, is not an act of insolvency, though he may have traded through an agent in this country and may have contracted debts and acquired property in this country (r).

(k) *Karsandas v. Maganlal* (1902) 26 Bom. 476; *Lulchand v. Hussainio* ('27) A. S. 78, 97 I. C. 257.

(l) *Re Spackman* (1890) 24 Q. B. D. 728.

(m) *Dutton v. Morrison* (1810) 17 Ves. 193, 199, 34 E. R. 75, 77; *Re Sharp* (1900) 83 L. T. 416. See also *Ex parte Villars* (1874) L. R. 9 Ch. App. 432, 443.

(n) *Re Hughes* (1893) 1 Q. B. 595. As to the definition of "transfer of property" see the Transfer of Property Act, 1882, s. 5. Referring to the definition of "transfer" in that section, and the words "in future" in particular, Marten J. said in *Re Mahomed Hasham & Co.* (1922) 24 Bom. L. R. 861, 871, 75 I. C. 203, ('23)

A. B. 107, "I do not see that that definition applies to P.-t. I. A." See also the Indian Trusts Act, 1882, s. 5 and s. 78 (c).

(o) *Re Spackman* (1890), 24 Q. B. D. 728. The words used in the B.A., 1914, are "conveyance or assignment." These words have been held to include a declaration of trust of leaseholds; *Re Hughes* (1893) 1 Q. B. 595.

(p) *Lipton v. Bell* (1924) 1 K. B. 701; *Re Spackman* (1890) 24 Q. B. D. 728.

(q) *Ex parte Crispin* (1873) L. R. 8 Ch. App. 374, 380.

(r) *Cooke v. Charles A. Vogeler Co.* (1901) A. C. 102.

98. Party or privy to transfer for benefit of creditors.—A creditor who has assented to a transfer for the benefit of creditors cannot, as a rule, take advantage of it as an act of insolvency (s), but he may do so if his assent has been procured by misrepresentation of his assets by the debtor (t), or if the transfer is fraudulent as against him, as for instance, on the ground of a secret preference given to another creditor (u).

99. Transfer for benefit of creditors void as against Official Assignee or Receiver.—If a debtor transfers all or substantially all his property for the benefit of his creditors generally and is adjudicated an insolvent within three months after the date of the transfer, the transfer is void as against the Official Assignee or Receiver whether the adjudication was on the petition of a creditor (v), or of the debtor (w), and the trustees of the deed must hand over the property to the Official Assignee or Receiver as the case may be. A transfer, however, for the benefit of creditors generally is not void in itself, and effect will be given to it if insolvency does not ensue within three months. It is void only if insolvency supervenes and that too within three months from the date of the transfer (x). If the debtor is not adjudged insolvent within that period, the trustees of the deed will continue to hold the property for the benefit of his creditors; and the debtor being divested of all interest in the property, it cannot be attached in execution of a decree against him, though the decree-holder was not a party to the deed (y).

(b) *Transfer with intent to defeat or delay creditors.*

[*P.-t. I. A.*, s. 9 (b); *Prov. I. A.*, s. 6 (b)].

100. Transfer with intent to defeat or delay creditors.—A debtor commits an act of insolvency if, in British India or elsewhere, he makes a transfer of his property or any part thereof with intent to defeat or delay his creditors. This act of insolvency was first introduced by 1 Jac. 1, c. 15, sec. 2. It is quite different from the act of insolvency dealt with above. The transfer in this case need not be of all or substantially all the property of the debtor; it may be a transfer of "any part" of his property (z). Further, it need not be in favour of creditors generally; it may be in favour of a single

- (s) *Ex parte Stray* (1867) L.R. 2 Ch. App. 374; *Re Thomas Hawley* (1897) 4 Mans. 41; *Re Brindley* (1906) 1 K. B. 377; *Re Mills* (1906) 1 K. B. 389.
- (t) *Re Tanenburg* (1889) 60 L. T. 270, 6 Morr. 49.
- (u) *Ex parte Milner* (1885) 15 Q. B. D. 605.
- (v) *Ex parte Villars* (1874) L. R. 9 Ch. App. 432, 443, 445; *Re Hirth* (1899) 1 Q. B. 612.
- (w) *Khoo Kwat Siew v. Wooi Taik*

- Hwat* (1892) 19 Cal. 223, 19 I. A. 15; *Manmohandas Ramji v. N. C. Macleod* (1902) 26 Bom. 765, 776-779.
- (z) *Re Hirth* (1899) 1 Q. B. 612, 621.
- (y) *Bamanji v. Naoraji* (1864) 1 Bom. H. C. 233; *Bapuji v. Umedbhai* (1871) 8 Bom. H. C. 245; *Lalchand v. Hussainio* ('26) A. S. 78, 82, 97 I. C. 257.
- (z) *Re Prior* (1922) B. & C. R. 1, on appeal from (1921) B. & C. R. 198.

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creditor (a), or of some one who is not a creditor at all (b), but it must be made by him with intent to defeat or delay his creditors.

100A. Intent to defeat or delay creditors.—Sec. 1 (1) (b) of the Bankruptcy Act, 1914, is in the following terms: “A debtor commits an act of bankruptcy if, in England or elsewhere, he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof.” The Bankruptcy Act, 1849, and the earlier Acts, contained also the words “with intent to defeat or delay his creditors.” These words were omitted for the first time in the Bankruptcy Act, 1869, sec. 6 (2), and they have been omitted in subsequent Acts. As to the meaning of the words “fraudulent” and “with intent to defeat or delay creditors” in the Act of 1849, it was said in *Re Wood* (c), that the word “fraudulent” meant fraudulent as against creditors; that the conveyance, having to be fraudulent against creditors, it must be with intent to defraud creditors and the words “with intent to defraud creditors” were therefore to be implied; that there was no difference between a conveyance fraudulent as against creditors and a conveyance with intent to defeat or delay creditors except that in the former case the intent is not a matter of fact but a conclusion of law; and that the words “with intent to defeat or delay creditors” were left out in the Act of 1869 as superfluous and misleading.

The words used in the Indian Acts are “with intent to defeat or delay creditors.” The expression “fraudulent” does not occur in either of the two Acts. It would seem that where a transfer is entirely for a past consideration, the presumption that it was made with intent to defeat or delay creditors is immediately raised. Where, however, it is for a present consideration, proof of intent to defeat or delay creditors is necessary; the intent may be inferred from surrounding circumstances (c1).

100B. Transfers fraudulent under Transfer of Property Act, 1882, sec. 53.—Sec. 53 of the Transfer of Property Act, 1882, is taken from the statute 13 Eliz. c. 5, known as the statute of Elizabeth. Both relate to transfers fraudulent as against creditors. The statute 13 Eliz. c. 5 (now the Law of Property Act, 1925, sec. 172), after reciting that it is made for the avoiding of fraudulent feoffments and grants of lands and of goods, which feoffments and grants are devised of malice and fraud to the end and purpose to delay, hinder and defraud creditors of their just and lawful actions, enacts that every feoffment and grant made for any intent or purpose so declared, shall be deemed and taken only against the person whose action shall be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void. The statute contains a proviso for the protection of purchasers in good faith and for consideration. Sec. 53

(a) *Re Wood* (1872) L.R. 7 Ch. App. 302.

(b) See *Re David and Adlard* (1914) 2 K. B. 694.

(c) (1872) L. R. 7 Ch. App. 302, 307;

Re Prior (1922) B. & C.R. 1.

(c1) See *Re Colemere* (1865) L. R. 1 Ch. App. 128.

of the Transfer of Property Act provides that every transfer of immovable property, made with intent to defeat or delay the creditors of the transferor, is voidable at the option of any person so defeated or delayed, but that nothing contained in the section shall impair the rights of any transferee in good faith and for consideration (d). The section does not, as the statute does, refer to movable property, but the same principles have been held to apply to this kind of property also (d1).

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A transfer under sec. 53 of the Transfer of Property Act may be a colourable transfer as in *Twyne's case* (e), or a voluntary transfer or gift, or it may be a transfer for consideration. In *Twyne's case* a debtor who had several creditors purported to transfer the whole of his property to one of the creditors in satisfaction of his debt. The transfer was made secretly and the debtor continued in possession of the property and dealt with it as his own. It was held that the intention of both the parties was that the transferee should in fact take no beneficial interest, but be a trustee for the transferor, and that the transaction was a mere sham devised for the purpose of putting the property out of the reach of the creditors and therefore voidable at their option. Where a transfer is voluntary, it will be presumed to have been made with intent to defeat or delay creditors if the necessary consequence of it is to defeat or delay creditors (f). But where a transfer is for consideration, it is necessary in order to avoid the transfer, to show want of good faith on the part of the transferee. It must be noted that a transfer under sec. 53 is not voidable unless it was made with intent to defeat or delay creditors generally. A transfer therefore is not voidable under that section, if its effect or object is to prefer one creditor to another even though it is made with the intention to defeat an anticipated execution. What sec. 53 invalidates is a transfer which removes the whole or a part of the debtor's property from the creditors as a body to the benefit of the debtor (g).

100C. Transfers fraudulent under insolvency law.—

For the purposes of insolvency law there are two classes of transfers which by reason of being considered to be fraudulent as against creditors are acts of insolvency, namely, (1) transfers which are

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| <p>(d) Previously to the Transfer of Property Act, the Courts in India were guided by the principles of the statute 13 Eliz., c. 5; see <i>Abdool Hye v. Mir Mohamed Mozuffer Hossein</i> (1884) 11 L. A. 10, 10 Cal. 616.</p> <p>(d1) <i>Kunhu Pothanassiar v. Raru Nair</i> (1923) 46 Mad. 478, 481, 72 I.C. 727, ('23) A. M. 558.</p> <p>(e) 1 Sm. L. C., 12th ed., 1. See also <i>Rajan v. Ardeshir</i> (1880) 4 Bom. 70; <i>Musadee Mahomed v. Ally Mahomed</i> (1854) 6 M. I. A. 27;</p> | <p><i>Rangilbhai v. Vinayak</i> (1887) 11 Bom. 666; <i>Chidambaram v. Srinivasa</i> (1914) 18 C. W. N. 841, 23 I. C. 714. [P. C.]</p> <p>(f) See <i>Freeman v. Pope</i> (1870) L. R. 5 Ch. App. 538; <i>Abdool Hye v. Mir Mohammad Mozuffer Hossein</i> (1884) 11 L. A. 10, 10 Cal. 616.</p> <p>(g) <i>Musahar Sahu v. Hakim Lal</i> (1916) 43 I. A. 104, 43 Cal. 521, 32 I.C. 343; <i>Atmaram v. Dayaram</i> ('29) A.S. 94, 115 I. C. 330; <i>Glegg v. Bromley</i> (1912) 3 K. B. 474, 492.</p> |
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fraudulent under the Insolvency Acts, such as a transfer under cl. (b) now under consideration, and (2) transfers which are fraudulent under the Transfer of Property Act, 1882, sec. 53. Transfers fraudulent under the Transfer of Property Act, sec. 53, are acts of insolvency within cl. (b), and will support an insolvency petition if presented within three months of the transfer. A transfer, though for consideration, would be an act of insolvency within cl. (b) of this section, if it was made with intent to defeat or delay creditors. But a transfer for consideration is not fraudulent within sec. 53 of the Transfer of Property Act unless the transferee was a party to the fraud. Such a transfer, therefore, cannot be an act of insolvency (h).

Transfers fraudulent under the insolvency law, that is, made with intent to defeat or delay creditors within cl. (b) of this section, may be divided into two classes, namely:—

1. Transfers of all or substantially all the property of the debtor [paras. 101 to 108].
2. Transfers of part only of the property of the debtor [para. 109].

101. Sale or mortgage of substantially the whole property for past debts.—A sale or mortgage of the whole or substantially the whole of a debtor's property without present equivalent is a fraud upon the bankruptcy law. This was first laid down by Lord Mansfield in *Worseley v. De Mattos* (h1), and it has been followed in later cases. A transfer by a debtor of all or substantially all his property in consideration of a past debt, that is, a debt already incurred, whether made absolutely or by way of security, is an act of insolvency within the meaning of this clause, whatever the motives of the parties may have been (i). Such a transfer necessarily defeats or delays the other creditors by preventing them from issuing execution; this being so, no evidence of actual intent to defeat or delay creditors is necessary (j). It is different, however, where the transfer is of part only of the property. If the debtor has disposed of part only of his property, the intention to defeat or delay creditors must be proved as a fact: see para. 109 below, "Transfer of part only of debtor's property."

An assignment by a debtor to a creditor in consideration of a past debt and a secret verbal agreement that that creditor will pay the other creditors generally is in effect an assignment for a past debt, and as such an act of bankruptcy. In *Ex parte Chaplin* (k), a trader in embarrassed

(h) See *Re Cranston* (1892) 9 Morr. 160; *Ex parte Chaplin* (1884) 26 Ch. D. 319, per Fry, L. J., at p. 336; *Re Fasey* (1923) 2 Ch. 1, (1923) B. & C. R. 8; *Re Hirth* (1899) 1 Q. B. 612, 620, per Vaughan Williams, L.J., at p. 625; *Re Seehase* (1917) 22 C. W. N. 335, 340, 46 I. C. 196.

(h1) (1758) 1 Burr. 467, 97 E. R. 407.

(i) *Worseley v. De Mattos* (1758) 1

Burr. 467, 97 E. R. 407; *Re Wood* (1872) L.R. 7 Ch. App. 302.

(j) *Re Wood* (1872) L.R. 7 Ch. App. 302, 308; *Ex parte Ellis* (1876) 2 Ch. D. 797; *Re Rayment* (1899) 6 Mans. 288; *Re Jukes* (1902) 2 K. B. 58; *Re Prior* (1922) B. & C. R. 1.

(k) (1884) 26 Ch. D. 319; *Re Cranston* (1892) 9 Morr. 160, 168, 170.

circumstances assigned the whole of his property to a creditor in consideration (as expressed in the deed) of the release of a debt of £3,271. In fact, only £1,370 was then due and the real consideration was the release of that debt and a secret verbal agreement to undertake the payment of the assignor's debts. The business continued to be carried on by the assignor in his own name as before though he was in fact acting under the directions of the assignee and as his salaried servant. At the date of his bankruptcy nearly all the trade debts due at the date of the deed had been paid in the course of the business. It was held that the deed was void as an act of bankruptcy, its necessary effect being to defeat and delay the creditors in enforcing their ordinary remedies for the recovery of their debts and there being no means by which they could compel the fulfilment by the assignee of his agreement to pay their debts. Cotton, L.J., in giving judgment said :—" If persons will take from a man who is in difficulties a debt of this description, which has the effect of withdrawing and is intended to withdraw all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the debt is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor or it might afford an effectual way of paying the creditors."

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102. Sale of substantially the whole property for a present consideration.—A *bona fide* sale by a debtor of the whole or substantially the whole of his property for a *present* consideration is not an act of insolvency. Such a transaction amounts merely to a conversion of goods into money (*l*). The sale, however, will constitute an act of insolvency if the seller intends to defeat his creditors, as where he intends to abscond with the proceeds of sale, and he does in fact abscond, although the purchaser, if he is not aware of the fraudulent intention of the debtor, will be protected by sec. 57 of the Presidency-towns Insolvency Act [Provincial Insolvency Act, sec. 55] (*m*). The conversion by a trader in embarrassed circumstances of his business, which constitutes the whole of his assets, into a one-man company, consisting really of himself, the consideration being not cash, but shares which are practically worthless and an undertaking by the company to pay his debts, amounts to an act of bankruptcy (*n*). But "a fair and *bona fide* sale is scarcely within the mischief for which the Bankruptcy Act proposes a remedy" (*o*). The burden of proving that the sale is not *bona fide* lies on the party who alleges it (*p*). The consideration

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| <p>(<i>l</i>) <i>Rose v. Haycock</i> (1834) 1 Ad. & Ell. 460, 110 E. R. 1283; <i>Baxter v. Pritchard</i> (1834) 1 Ad. & Ell. 456, 110 E. R. 1282; <i>Lee v. Hart</i> (1865) 11 Exch. 880.</p> <p>(<i>m</i>) <i>Shears v. Goddard</i> (1896) 1 Q. B. 406; <i>Re Jukes</i> (1902) 2 K. B.</p> | <p>58, and <i>Ex parte Myers</i> (1908) 1 K. B. 941 [where the transferee was a party to the fraud].</p> <p>(<i>n</i>) <i>Re Hirth</i> (1899) 1 Q. B. 612.</p> <p>(<i>o</i>) <i>Rose v. Haycock</i> (1834) 1 Ad. & Ell. 460, 110 E. R. 1283.</p> <p>(<i>p</i>) <i>Rose v. Haycock, supra</i>.</p> |
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need not be of the same value as the property sold. "A *bona fide* sale of goods in a season of pressure by a trader for whatever ready money can be obtained is valid, though the price may be small" (q).

103. Mortgage of substantially the whole property for a present consideration.—A *bona fide* mortgage or pledge by a debtor of the whole or substantially the whole of his property for a present consideration is not an act of insolvency, even though the consideration may not be strictly adequate. The reason is that even if the advance bears a small proportion to the property pledged, it might be of more advantage to the trader and his creditors than the property itself. Thus where the property pledged was worth £6,000 and the limit of the advance stipulated for was £1,800, and both the lender and borrower thought that the advance was requisite to carry on the business and would enable the borrower to do so, it was held that the pledge did not constitute an act of bankruptcy. Campbell, C.J., said: "In times of pressure an advance in ready money of a very small amount may very often enable a trader to avoid stopping payment, and so enable him to pay 20s. in the pound. I cannot therefore say that the inadequacy of the advance makes the deed fraudulent". In the same case Erle, J., said: "The power of raising a small sum in ready money on an emergency may often, in the exigencies of trade, be of immense value. It would be dangerous to lay down that an arrangement by which a trader under such circumstances raises money is as a matter of law void because of any disproportion between the security and the sum raised" (r).

The advance and the mortgage need not be contemporaneous. As a general rule, where a sum of money is advanced on the faith of a promise that a mortgage shall be given, and a mortgage is subsequently given in pursuance of the promise, such sum is to be treated as a *present* advance on the security of the goods and not as a *past* debt, provided the promise to give the mortgage is a *bona fide* and an absolute one. But where it is agreed between the parties that the execution of the mortgage should be postponed until the trader was in a state of insolvency, in order to protect his credit, such postponement is evidence of an intention to commit an actual fraud against the general creditors, and it will vitiate the mortgage as one made for a *past* consideration (s). The promise in such a case is neither *bona fide* nor absolute. It is only a device to enable the debtor to acquire a false credit (t).

(q) *Bittlestone v. Cooke* (1856) 6 E. & B. 296, 309, 119 E. R. 875, 880; *Re Cranston* (1892) 9 Morr. 160, 164.

(r) *Bittlestone v. Cooke* (1856) 6 E. & B. 296, 119 E. R. 875 *Ex parte*

Hauzwell (1883) 23 Ch. D. 626.

(s) *Ex parte Fisher* (1872) L. R. 7 Ch. App. 636, 642, 644-645.

(t) *Ex parte Kilner* (1879) 13 Ch. D. 102. See also *Ex parte Hauzwell* (1883) 23 Ch. D. 626.

104. Mortgage of substantially the whole property securing existing debt and present advance.—A mortgage of the whole of the debtor's property partly in consideration of an existing debt and partly in consideration of a present advance is not of itself an act of insolvency. The reason why a mortgage of the whole of a debtor's property in consideration of a *past* debt is *per se* an act of insolvency but a mortgage of the whole property in consideration of a past debt and a substantial present advance is not, is that while in the former case the mortgagee can step in and put a stop to the business and thus sweep off the whole of the assets at any moment, it is not so in the latter case; for where there is a present advance of which the debtor really has the advantage, and which he can apply for the purchase of goods, or otherwise for his own use, there is a substantial exception out of the debtor's property such as might enable him to carry on his trade with advantage (*u*). The true test for determining whether or not such mortgage is an act of insolvency is whether the *lender* intended that the advance should enable the debtor to carry on his business and whether he had reasonable grounds for believing that it would enable him to do so. If these questions can be answered in the affirmative, the execution of the deed is not an act of insolvency. The Court ought not in such a case to look at the intention of the *debtor* not communicated to the lender, nor at the actual result of the loan (*v*). Further, the amount of the further advance is not the test (*w*), but the smallness of the further advance may, if it is made on the eve of insolvency, be strong evidence that the advance was made, not to enable the debtor to continue his trade but to secure the past debt (*x*). In *Ex parte Fisher* (*y*), a trader applied to a creditor who had previously advanced him £600 for a further advance of £100, and the advance was made on the debtor giving a conditional promise that if he did not repay the £100 within ten days he would make an assignment of all his property to the creditor to secure both the past and fresh advance. The £100 was applied in paying the debts of three creditors. Default was made in payment, and the assignment was executed. Soon thereafter the debtor was adjudicated bankrupt, and the question arose whether the execution of the deed was an act of bankruptcy and therefore void against the trustee in bankruptcy. It was held on the evidence that the whole object of the loan was to secure the repayment of the past debt. Mellish, L.J., said: "It was argued, no doubt, that the advance of £100 was to enable the bankrupt to go on with his trade, and that if he had been able to go on with his trade, that might have been for the advantage of the other creditors;

- (*u*) *Pennell v. Reynolds* (1862) 11 C. B. N. S. 709; *Mercer v. Peterson* (1868) L.R. 3 Ex. 104, 142 E. R. 974; *Lomax v. Buxton* (1871) L. R. 6 C. P. 107.
(*v*) *Ex parte Johnson* (1884) 26 Ch. D. 338, 346-347; *Administrator of Jamaica v. Lascelles* (1894) A. C.

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(*w*) *Ex parte Ellis* (1876) 2 Ch. D. 797; *Ex parte Johnson* (1884) 26 Ch. D. 338, 346.
(*x*) *Ex parte Fisher* (1872) L.R. 7 Ch. App. 636.
(*y*) (1872) L.R. 7 Ch. App. 636.

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but we are of opinion that there was no reasonable probability, and that both Mr. Wills lender and the bankrupt must have known there was no reasonable probability that the advance of £100, to be repaid in a week or ten days, would enable the bankrupt to go on. We are of opinion that if we were to hold this bill of sale to be valid, we should practically abrogate the rule that the assignment of the whole of a debtor's effects in consideration of a *past* debt is an act of bankruptcy, and should in every case enable a favoured creditor, who can trust his debtor to give him a bill of sale of all his property when required, to obtain payment of his debt in full to the prejudice of the other creditors".

105. Mortgage of substantially the whole property securing existing debt and future advance.—A mortgage of substantially the whole of a debtor's property to secure a past debt and further advances to be made *afterwards* is not an act of insolvency, if there is a contemporaneous *bona fide* agreement on the part of the mortgagee to make further advances, and such advances are afterwards in fact made (2). It is not sufficient that further advances were within the contemplation of the parties and the deed was stamped so as to cover them, and that advances were actually made after the execution of the deed. To prevent the mortgage from being an act of insolvency, there must be an *agreement* by the mortgagee to make such advances (a). The agreement need not be contained in the instrument of mortgage, but may be verbal (b). Nor is it necessary that the agreement should be technically binding at law; a *bona fide* promise is sufficient (c). As in the case of a mortgage for securing an existing debt and a present advance, so here, the question in each case will be whether there is a *bona fide* agreement for the future advance with a view to enable the debtor to carry on his business, or the transfer is a mere pretence to secure payment of the existing debt.

The leading Indian case on the subject is *Khoo Kwat Siew v. Wooi Taik Hwat* (d). In that case a trading firm assigned all its assets to the plaintiff as security for its debts amounting to Rs. 30,000. The plaintiffs at the same time advanced a sum of Rs. 25,000 and promised to make future advances amounting in the whole to a lac of rupees. The mortgage was made on the 11th March 1889. On the 11th September 1889, the plaintiffs brought a suit against the firm upon the mortgage, and claimed possession of the stock and effects of the firm. On the 16th December 1889, the firm was adjudicated insolvent on its own petition, and the Official Assignee was made defendant in the suit. The Court of the Recorder of Rangoon dismissed the suit on the ground that the mortgage was void as against the Official Assignee. This judgment was reversed on appeal to the Privy Council, and it was held that

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| <p>(2) <i>Ex parte Winder</i> (1875) 1 Ch. D. 290, affirmed <i>sub nom</i>; <i>Ex parte Sheen</i> (1875) 1 Ch. D. 560.</p> <p>(a) <i>Ex parte Dann</i> (1881) 17 Ch. D. 26.</p> | <p>(b) <i>Ex parte Winder</i> (1875) 1 Ch. D. 290.</p> <p>(c) <i>Ex parte Wilkinson</i> (1883) 22 Ch. D. 788.</p> <p>(d) (1892) 19 I. A. 15, 19 Cal. 223.</p> |
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the mortgage was valid against the Official Assignee. In the course of the judgment their Lordships said: "The well-known rule of law is, that if a trader assigns all his property except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy, and is void against the creditors and the assignee simply because nothing is left with which to carry on his business; whereas if he receives substantial assistance something is left to carry on the business". Their Lordships then reviewed the evidence and held that the mortgage was partly in consideration of a past debt and partly in consideration of present and future advances, and said: "That being so, their Lordships consider that this deed must be held to be valid. They are not aware of any case in which, a simultaneous advance of a large amount being made and future support being promised of a large amount, the validity of such a deed has been seriously called in question. In this case the simultaneous advance was nearly as much as the pre-existing debt and the undertaking to give future advances was considerably more. It has been argued for the assignee that the proper test is, whether it was the intention of the parties that the trader giving such a security should carry on his business. Their Lordships conceive that that question hardly arises except in those cases where the amount of additional assistance given at the time of the mortgage is so small as to create a doubt whether it is substantial; and then comes in the inquiry into the motives of the parties, whether they did really intend that the business should be carried on or not. It is impossible to raise such a question here, where the amount of simultaneous and future advance is very large".

106. Consideration.—The principle upon which a transfer by a debtor of the whole or substantially the whole of his property for a present consideration or partly for a past debt and partly for a present or future advance is protected, is that the debtor receives an *equivalent* for his property. It is not essential, however, in the case of a transfer by way of mortgage, that the advance should be proportionate to the property charged or be of equal value with the existing debt, if it be made *bona fide* to enable the debtor to meet his engagements, or, if he be a trader, to enable him to continue his business (*e*).

The consideration need not be in a cash payment (*f*). It may consist in a release of the debtor's property from a charge already affecting it (*g*), or it may be a sum paid to another creditor to release a previous charge on the property (*h*). But payment by the transferee to some creditors, though honestly made, is not a sufficient equivalent to prevent a transfer of the whole

(*e*) *Ex parte Threlfall* (1876) 46 L. J. Bk. 8; *Ex parte Evans* (1879) 39 L. T. 364.

(*f*) *Ex parte Threlfall* (1876) 46 L. J. Bk. 8 [further supply of goods to debtor]; *Ex parte Reed* (1872)

L. R. 14 Eq. 582 [retiring bills upon which debtor was liable].

(*g*) *Whitmore v. Claridge* (1863) 33 L. J. Q. B. 87.

(*h*) *Lomax v. Buxton* (1871) L. R. 6 C. P. 107.

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of the debtor's property from being an act of insolvency (i); nor an agreement by him with the debtor to pay creditors (j). Mere forbearance to seize under an execution (k), or giving time to a debtor to pay (l), is not a sufficient consideration to prevent a transfer of the whole of a debtor's property from being an act of insolvency.

107. After-acquired property.—In *Graham v. Chapman* (m) it was held that a transfer by a debtor of the whole of his property to secure a past debt and a present advance was an act of bankruptcy, if the transfer included property which the transferor might purchase with the advance, the ground of the decision being that such a transfer would enable the transferee to take the whole of the transferor's property including *future assets* and to apply it in payment of both the old and the new debt in preference to the claims of the other creditors. This decision was overruled by the Court of Appeal in *Ex parte Hauxwell* (n), and it was held that such a transfer was perfectly valid though it included after-acquired property, even if such property was purchased by means of the fresh advance. In a Calcutta case decided thirteen years after *Ex parte Hauxwell*, the mortgage was to secure existing debts and future advances and it included future assets as in *Ex parte Hauxwell*. The Court held, following *Graham v. Chapman*, that the mortgage was an act of insolvency and was therefore void against the Official Assignee (o). The attention of the Court was not drawn to *Ex parte Hauxwell*. The Calcutta decision is clearly wrong.

108. What is whole of debtor's property.—The answer to the question what is the whole or substantially the whole of the debtor's property depends upon the circumstances of each case. The point is important, for a transfer by a debtor of *part* only of his property, though it be in consideration wholly of a past debt, is not necessarily an act of insolvency (p). If notwithstanding the transfer, the transferor is able to meet his engagements, or, if a trader, to carry on his business as before, the transfer is not an act of insolvency; but if, notwithstanding the property excepted from the transfer, the effect of the transfer is to delay creditors or to render the transferor incapable of carrying on his business as before, the transfer will be an act of insolvency (q). The burden of proving that the transfer is calculated to delay creditors or to stop business lies upon the person who sets up the transfer as an act of insolvency (r).

(i) *Re Sharp* (1900) 83 L. T. 416.

(j) *Ex parte Chaplin* (1884) 26 Ch. D. 319.

(k) *Woodhouse v. Murray* (1867) L. R. 2 Q. B. 634; *Ex parte Cooper* (1878) 10 Ch. D. 313.

(l) *Ex parte Cooper* (1878) 10 Ch. D. 313.

(m) (1852) 12 C. B. 85, 138 E. R. 833.

(n) (1883) 23 Ch. D. 626.

(o) *In the matter of Ambrose Summers* (1896) 23 Cal. 592.

(p) *Young v. Ward* (1852) 8 Ex. 221, 155 E. R. 1328.

(q) *Ex parte Foxley* (1868) L. R. 3 Ch. App. 515; *Re Rayment* (1899) 6 Mans. 288. See also *Re Glenville* (1885) 2 Morr. 71.

(r) *Wedge v. Newlyn* (1833) 4 B. & Ad. 831, 110 E. R. 668.

The effect of the transfer may be judged to a large extent from the value of the property excepted from the transfer. In determining that value, the value of book debts is to be taken into account (s). If the exception is substantial, the transaction will be allowed to stand, but if it is merely colourable the transaction will be declared an act of insolvency. Where the excepted portion consists of property which would not pass to the Official Assignee or would not be capable of being seized in execution, it cannot be said to be substantial (t).

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109. Transfer of part only of debtor's property.—A *bona fide* transfer of part only of a debtor's property in consideration of a *present* advance is not an act of insolvency. "The law has been long established that for a debtor to part with a portion, although it may be the larger portion of his goods, and to receive for those goods some consideration in return, although the consideration may not be adequate or to their full value, is not a fraud" (u).

A transfer of *part* only of a debtor's property in consideration of a *past* debt is not an act of insolvency *per se*. Such a transfer is an act of insolvency if made with intent to defeat or delay creditors, and such intent must be proved. Transfers of part only of a debtor's property in consideration of a past debt mostly fall under the head of fraudulent preferences within cl. (c) of this section; but a transfer of part of a debtor's property may be fraudulent as against creditors within cl. (b), even though there be no preference of a creditor or creditors.

It is obvious that a transfer of part only of a debtor's property in consideration of a past debt does not stand on the same footing, so far as it affects creditors, as a transfer of the whole of his property in consideration of such a debt. While a pre-existing debt may amount to Rs. 20,000, the total assets may be worth Rs. 50,000, and in such a case it is obvious that a transfer of part of the assets to satisfy the debt will still leave sufficient assets in the hands of the debtor to enable him to meet his other engagements, or, if a trader, to carry on his business as before. Such a transfer cannot constitute an act of insolvency, as it cannot be said of the transfer that it was made with intent to defeat or delay creditors. It has always been held that it is competent to a trader to appropriate specific portions of his property in payment of, or by way of security for, particular debts (v). If this were not allowed, commerce could not be carried on. The true principle applicable to cases of this kind seems to be that if the debtor has other

(s) *Ex parte Burton* (1879) 13 Ch. D. 102.

(t) *Ex parte Hawker* (1879) L.R. 7 Ch. App. 214.

(u) *Re Cranston* (1892) 9 Morr. 160, 168; *Pennell v. Reynolds* (1862)

11 C. B. N. S. 709, 721-722, 142 E. R., 974, 979.

(v) *Worseley v. De Matto*s (1758) 1 Burr. 467. 97 E. R. 407.

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property of a substantial amount, with which he can carry on his business as before, the transfer of a portion may be good (*w*). If, however, a transfer of a portion is made on the eve of insolvency with intent to defeat or delay creditors, the transfer will be an act of insolvency and void against the Official Assignee (*x*). See para. 103 above, "What is whole of debtor's property".

110. "Transfer".—A transfer, to be an act of insolvency under this clause, must pass or purport to pass some interest in the property (*y*). A deed of sale of immovable property executed by the owner to a third person, nominally for a consideration, but in reality without any consideration, to screen the property from his creditors, is a transfer within the meaning of this clause, for the deed purports to pass the owner's interest in the property (*z*).

111. "Gift".—The word "transfer" in this clause includes a gift. A gift by a debtor of the whole or substantially the whole of his property is *per se* an act of insolvency, and the gift will be void against the Official Assignee if the debtor is adjudged insolvent within three months from the date thereof (*a*). A gift of part only of the property is not an act of insolvency *per se*. It is an act of insolvency if it was made with intent to defeat or delay creditors (*b*). See Presidency-towns Insolvency Act, sec. 55, and Provincial Insolvency Act, sec. 53.

112. Mortgage by partner of partnership property.—It is an act of insolvency if a partner, who knows that his firm is insolvent, gives a charge upon the partnership assets for his own private debt, or for future advances to be made to himself. Such a transfer necessarily tends to defeat the creditors of the partnership, and to prevent the proper distribution of the partnership assets under the bankruptcy law, and is void against the Official Assignee (*c*).

113. Act of insolvency committed abroad.—The same principles which apply to transfers for the benefit of creditors executed outside British India apply also to transfers made with intent to defeat or delay creditors executed outside British India. See para. 97 above, under the same heading.

(*w*) *Young v. Ward* (1852) 8 Ex. 221, 155 E. R. 1328.

(*x*) *Ex parte Pearson* (1873) L.R. 8 Ch. App. 667.

(*y*) *Isitt v. Beeston* (1867) L. R. 8 Ex. 26.

(*z*) *Secretary of State for India v. Dadi Reddi* (1919) 36 Mad. L. J. 181, 51 I. C. 748; *Puran Nath v. Atwargir* (1915) 13 All. L. J. 434, 29 I.C. 217 [collusive suit].

(*a*) See *Worsley v. De Matto* (1758) 1 Burr. 467, and B. A., 1914, s. 1 (1) (*b*).

(*b*) See *Gnanabhai v. Srinivasa* (1868) 4 Mad. H. C. 84.

(*c*) *Ex parte Snowball* (1872) L.R. 7 Ch. App. 534, 546-547; *Re Seehase* (1917) 22 C.W.N. 335, 46 I. C. 196.

114. Transfer when void as against Official Assignee.—Transfers made with intent to defeat or delay creditors, which are void as acts of insolvency within cl. (b), are void against the Official Assignee only if they are executed within three months of the presentation of the petition (d). Such transfers are void as from the date on which they were executed. Such a transfer, however, may amount to a fraudulent transfer within the meaning of sec. 53 of the Transfer of Property Act, 1882. If it does, it may be availed of within three months as an act of insolvency. Even if it is not so availed of, it is liable to be avoided on proceedings taken by the Official Assignee or Receiver at any time within the period prescribed by the Indian Limitation Act, 1908. See para. 138 (8), where the subject is fully discussed.

(c) *Transfer by way of fraudulent preference.*

[*P.-t. I. A.*, s. 9 (c); *Prov. I. A.*, s. 6 (c).]

115. Transfer by way of fraudulent preference.—“A debtor commits an act of insolvency if, in British India, or elsewhere, he makes any transfer of his property or any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent”. This act of insolvency was first introduced into the Statute Book by the Bankruptcy Act, 1883 [s. 4 (c)]. It was, however, always held from a very early period of the bankruptcy law to be an act of bankruptcy (e), and was apparently introduced to set at rest a doubt on the subject occasioned by the decision in *Ex parte Stubbins* (f). This act of insolvency is seldom made a ground for the presentation of a petition. The reason is that before adjudication it is always more difficult to prove the facts constituting undue preference than after adjudication, for it is only after adjudication that the debtor's affairs are investigated and facts constituting undue preference are gathered. In almost every case where undue preference is proved, the petition is founded on some other act of insolvency. The subject of fraudulent preference is dealt with in Lecture X, Part V, below.

(d) *Departure or absence from British India, or dwelling house or place of business.*

[*P.-t. I. A.*, s. 9 (d); *Prov. I. A.*, s. 6 (d).]

116. Avoiding creditors.—A debtor commits an act of insolvency, if with intent to defeat or delay his creditors—

(i) he departs or remains out of British India ;

(d) <i>Mercer v. Peterson</i> (1868) L. R. 3 Ex. 104; <i>Jones v. Harber</i> (1870) L. R. 6 Q. B. 77. <i>P.-t. I. A.</i> , s. 51.	(e) See <i>Harman v. Fisher</i> (1774) Cowp. 117, 98 E. R. 998. (f) (1881) 17 Ch. D. 58.
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- (ii) he departs from his dwelling-house or usual place of business or otherwise absents himself;
- (iii) he secludes himself so as to deprive his creditors of the means of communicating with him.

These acts of bankruptcy were introduced some by the statute 34 and 35 Hen. 8, c. 4, and some by the statute 13 Eliz. c. 7. The words "or usual place of business" do not occur in any English Act.

117. Intent to defeat or delay.—All the acts mentioned in this clause are in themselves innocent, and to make them acts of insolvency, it is necessary to prove that the act was done with intent to defeat or delay creditors (*g*). If any of these acts is done with intent to defeat or delay creditors it is immaterial that no creditor has in fact been delayed (*h*). The intent should be alleged specifically in the petition (*i*), but if it is not, the defect may be cured by an amendment at any time before adjudication. In that case the amended petition should be served on the debtor (*j*). Statements made or letters written by a debtor are admissible as evidence of intention (*k*).

118. Departing or remaining out of British India.—The departure of a debtor out of British India, to constitute an act of insolvency, must be with intent to defeat or delay his creditors. If there be no such intent, as where the debtor departs from British India for the purposes of his business, the departure will not constitute an act of insolvency, even if creditors are delayed thereby (*l*). The intent to defeat or delay creditors is in most cases a matter of inference. Thus if a trader leaves British India without making any provision for the payment of his bills, it will be presumed that his intention was to delay his creditors (*m*), but this may not be so, if the debtor's permanent residence is outside British India (*n*). The act of insolvency now under consideration is complete at the moment of departure (*o*). As to the departure of an agent, see para. 136 below, "Act of insolvency committed by agent."

The words "remains out of British India" imply that the person who remains out of British India has his home or place of business in British India, and cannot reasonably be held to apply to the case of a foreigner who leaves British India for his own home and remains in his home (*p*).

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| <p>(<i>g</i>) <i>Re Wood</i> (1872) L.R. 7 Ch. App. 302, 306.</p> <p>(<i>h</i>) <i>Williams v. Nunn</i> (1809) 1 Taunt 270, 127 E. R. 837.</p> <p>(<i>i</i>) <i>Ex parte Coates</i> (1877) 5 Ch.D. 979, 36 L.T. 806; <i>Abu Haji v. Haji Jan</i> (1906) 8 Bom. L.R. 648.</p> <p>(<i>j</i>) <i>Re Fiddian, Squire & Co.</i> (1892) 66 L.T. 203.</p> <p>(<i>k</i>) <i>Ex parte Brandon</i> (1884) 25 Ch.D. 500, 503; <i>Bateman v. Bailey</i></p> | <p>(1794) 5 T.R. 512, 101 E.R. 288.</p> <p>(<i>l</i>) <i>Ex parte Osborne</i> (1813) 1 Rose. 387; <i>Warner v. Barber</i> (1816) Holt, N.P. 175.</p> <p>(<i>m</i>) <i>Ex parte Kilner</i> (1837) 2 Dea. 324.</p> <p>(<i>n</i>) <i>Ex parte Brandon</i> (1884) 25 Ch. D. 500.</p> <p>(<i>o</i>) <i>Ex parte Gardner</i> (1812) 1 Ves. and B. 45.</p> <p>(<i>p</i>) <i>Ex parte Crispin</i> (1873) L.R. 8 Ch. App. 374, 380.</p> |
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The same principle applies in the case of a domiciled British subject whose permanent residence is out of British India (q). Remaining out of British India is a continuing act of insolvency (r).

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119. Departure or absence from dwelling house or place of business.—Absenting oneself is no act of insolvency, unless it be with intent to defeat or delay creditors. Whether that intention exists is a question of fact (s). Thus if a debtor departs from his place of business with all his available cash with the avowed object of defeating a threatened attachment, it is clearly an act of insolvency (t). If a trader shuts up his shop during business hours, or departs from his dwelling house, without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors (u); but the absence may be satisfactorily accounted for and the presumption may be rebutted (v). No such presumption, however, arises where the debtor has left a representative behind (w), or has left a direction that letters are to be addressed to him at a particular place (x). A departure to avoid an arrest, though under a groundless misapprehension, is an act of insolvency (y). In cases of departure, length of absence is immaterial if the intent be proved, as the act of insolvency is complete at the time of departure (z).

The words “otherwise absents himself” seem intended to cover cases which are not expressly specified in clause (d) of the section. The words mean “absenting himself” from his place of abode for the time being, though it may not be his dwelling-house, or from his place of business, or from some particular creditor at some other place (a). Thus concealing oneself in the back room of a house to avoid arrest is an act of insolvency (b). In order to prove “absenting” it is not necessary to show actual physical absence from a particular place. Presence in disguise may constitute “absence”. “Absenting” may equally be carried out by change of the debtor’s name or the name of his house (c). The mere failure of the debtor to keep an appointment with a creditor is not an act of

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| <p>(q) <i>Ex parte Brandon</i> (1884) 25 Ch.D. 500.</p> <p>(r) <i>Re Alderson</i> (1895) 1 Q. B. 183, 186.</p> <p>(s) <i>Ex parte Meyers</i> (1872) L.R. 7 Ch. App. 188, 190.</p> <p>(t) <i>Re Aramvayal Sabhapaty</i> (1897) 21 Bom. 297.</p> <p>(u) <i>Ex parte Austen</i> (1837) 2 Dea. 533; <i>Holroyd v. Whitehead</i> (1815) 2 Rose. 145; <i>Re McKeand</i> (1889) 6 Morr. 240; <i>Re Worsley</i> (1901) 1 K. B. 309.</p> <p>(v) <i>Ex parte Barney</i> (1863) 17 L.T. 488.</p> <p>(w) <i>Re Woolstenholme</i> (1887) 4 Morr. 258.</p> <p>(x) <i>Ex parte Addison</i> (1849) 3 De G.</p> | <p>& S. 580, 64 E.R. 615.</p> <p>(y) <i>Warner v. Barber</i> (1816) Holt, N. P. 175; <i>Newman v. Sketch</i> (1829) Mos. & M. 338; <i>Spencer v. Billing</i> (1812) 1 Rose. 362.</p> <p>(z) <i>Ex parte Gardner</i> (1812) 1 V. & B. 45; <i>Bayley v. Schofield</i> (1813) 1 M. & S. 338, 105 E.R. 127.</p> <p>(a) <i>Bernasconi v. Farebrother</i> (1830) 10 B. & C. 549, 109 E. R. 555; <i>Holroyd v. Gwynne</i> (1809) 2 Taunt. 176, 127 E.R. 1044.</p> <p>(b) <i>Chenoweth v. Hay</i> (1813) 1 M. & S. 676, 105 E.R. 252.</p> <p>(c) <i>Re Alderson</i> (1895) 1 Q. B. 183.</p> |
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insolvency, unless it is accompanied with intent to defeat or delay. Thus where a debtor promised to call at an appointed time on a creditor and pay the money, and having failed to procure the money he did not call but he was to be found at his own place of business, it was held that there was no act of insolvency (*d*). If, however, a debtor absents himself from a place at which he has appointed to meet his creditors with reference to a settlement of their demands with intent to defeat or delay them, it is an act of insolvency, although the place at which the appointment was made was not the debtor's usual place of business (*e*). Absenting oneself with intent to defeat or delay is a continuing act of insolvency (*f*).

120. Secludes himself.—If a debtor with intent to defeat or delay his creditors secludes himself so as to deprive his creditors of the means of communication with him, it is an act of insolvency. This is called in English law “beginning to keep house”. If a debtor gives a general order to be denied to creditors or others, and a creditor is in consequence denied, it will constitute an act of insolvency (*g*). The denial must be connected with the order to deny (*h*), and it must be to a creditor or his duly authorised agent (*i*). If the order to be denied to creditors is not followed by actual denial to a creditor, it seems there is no act of insolvency (*j*). It is not an act of insolvency if a debtor denies himself to a creditor at unreasonable hours, as for instance, at eleven o'clock at night (*k*).

There are various other circumstances besides denial to creditors from which this act of insolvency may be inferred. Thus it may be inferred if the debtor withdraws from that part of the house where he usually sits to a more retired part to avoid his creditors (*l*); but the inference does not arise if he is still accessible to his creditors, for he could then be served with process in the ordinary way (*m*). It may similarly be inferred if a banker closes the bank against customers and remains within (*n*). As to seclusion by an agent, see para 136 below, “Act of insolvency committed by agent.”

(*e*) *Sale or attachment in execution.*

[*P.-t. I. A.*, s. 9 (*e*); *Prov. I. A.*, s. 6 (*e*).]

121. Sale or attachment in execution.—In cases governed by the Presidency-towns Insolvency Act, a debtor commits an act of insolvency

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| (<i>d</i>) <i>Ex parte Meyer</i> (1872) L. R. 7 Ch. App. 188. | C. 705, 109 E. R. 612. |
| (<i>e</i>) <i>Russell v. Bell</i> (1842) 10 M. & W. 340, 152 E. R. 500. | (<i>k</i>) <i>Ex parte Hall</i> (1753) 1 Atk. 202, 26 E. R. 130; <i>Smith v. Currie</i> (1813) 3 Camp. 349, 170 E. R. 1407. |
| (<i>f</i>) <i>Re Alderson</i> (1895) 1 Q. B. 183. | (<i>l</i>) <i>Key v. Shaw</i> (1832) 8 Bing. 320, 131, E. R. 417. |
| (<i>g</i>) <i>Lloyd v. Heathcote</i> (1820) 2 B. & B. 388. | (<i>m</i>) <i>Kastur Chand v. Dhanpat Singh</i> (1896) 23 Cal. 26, 33-34, 22 I. A. 162. |
| (<i>h</i>) <i>Ex parte Foster</i> (1810) 17 Ves. 414, 34 E. R. 160. | (<i>n</i>) <i>Cumming v. Bailey</i> (1830) 6 Bing. 363, 130 E. R. 1320. |
| (<i>i</i>) <i>Ex parte Bamford</i> (1809) 15 Ves. 449, 33 E. R. 824. | |
| (<i>j</i>) <i>Fisher v. Boucher</i> (1830) 10 B. & | |

if any of his property has been sold or attached for a period of not less than *twenty-one days* in execution of the decree of any Court for the payment of money. The words in italics do not occur in the Provincial Insolvency Act, as it was thought that illusive attachments in favour of the debtor's friends or relatives with a view to take the property out of the reach of creditors were not so common in the mofussil as in presidency-towns. The result is that in cases governed by the Provincial Insolvency Act, it is only a sale in execution that can operate as an act of insolvency. The act of bankruptcy consisting in the holding of the debtor's goods by the sheriff for twenty-one days was first introduced by sec. 1 of the Bankruptcy Act, 1890.

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Leaving aside for the moment the act of insolvency which consists in imprisonment [cl. (h)], it may be stated that the acts of insolvency other than those mentioned in clause (e) are the debtor's own acts, while that mentioned in clause (e), though called the debtor's act in the first part of the section, is not his act at all. Where the act of insolvency is the debtor's own act, it dates from the time when it is *begun*; where the act of insolvency is not the act of the insolvent, it dates from the moment after the *completion* of the act. Thus a transfer for the benefit of creditors generally is an act of insolvency of the debtor's own, and the act dates from the time when it is begun, and it is void as against the Official Assignee as from the moment of its commencement. On the other hand, the act of insolvency now under consideration, not being an act of the debtor, dates from the time when it is completed, that is, from the moment after the completion of the sale or from the expiration of twenty-one days from the attachment as the case may be. As the sale constitutes an act of insolvency only from the moment *after its completion*, it is not void as against the Official Assignee as is a transfer for the benefit of creditors (o). As to the rights of an attaching creditor to revive the proceeds of the sale, and of the execution-purchaser, see paras. 592 to 602 below (p).

122. Twenty-one days.—The limit of twenty-one days is an allowance of time to the debtor within which to redeem if he can. The allowance of time being for the benefit of the person affected, as much time should be given as the language admits of. Such being the case, the attachment should have continued for the full period of twenty-one days. The day on which the goods are attached is to be excluded. Thus if the debtor's goods are attached on June 27, 1929, and sold on July 18, 1929, the period of attachment, excluding June 27, is twenty days and a fraction, and not twenty-one whole days. The attachment therefore cannot constitute an act of insolvency (q).

(o) *Ex parte Villars* (1874) L. R. 9 Ch. App. 432. See P.-t. I. A., s. 53 (3); Prov. I. A., s. 51 (3).
(p) See also P.-t. I. A., s. 53, and Prov. I. A., s. 51.
(q) *Re North* (1895) 2 Q. B. 264.

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The fact that the attachment continues for more than twenty-one days is not a continuing act of insolvency. Nor is there a repetition of the act of insolvency at the expiration of every twenty-one days thereafter. A petition therefore must be presented within three months of the completion of the first twenty-one days, though the attachment may continue for more than twenty-one days. Thus if goods are attached on March 23, 1929, the period of twenty-one days expires on April 13, 1929. A petition, therefore, for adjudging the debtor an insolvent founded on this act of insolvency, must be presented within three months of the completion of the twenty-one days. If it is presented after that period, the debtor cannot be adjudged insolvent on that petition (r). As to imprisonment, see para 135 below "Remaining in prison."

123. In execution of decree for payment of money.—The sale or attachment may be of the debtor's goods or it may be of any other property belonging to him, but it must be one in execution (s), and the decree must be one for the payment of money (t). In England it has been held that a sale in execution of an award under sec. 12 of the Arbitration Act, 1884, constitutes an act of bankruptcy (u), but the words in the Bankruptcy Act are "process in an action or in any civil proceeding," and the decision rested upon the words "process in *any civil proceeding*" (u1). The words in the present section are "in execution of the *decree* of any Court." An award for the payment of money filed in Court under sec. 11 of the Indian Arbitration Act, 1890, is not a "decree" within the meaning of the present clause, although it is enforceable under that Act *as if it were a decree*. No insolvency petition can therefore be founded on an attachment or sale in execution of an award (v). It is therefore for consideration whether clause (e) should not be amended by adding the words "or in execution of an award for the payment of money."

Where after a warrant for attachment of goods has been issued, the judgment-debtor pays the amount of the decree with the consent of the judgment-creditor to the sheriff to prevent attachment, the payment does not constitute an act of insolvency, because there is neither attachment nor sale in such a case (w).

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| <p>(r) <i>Re Beeston</i> (1899) 1 Q. B. 626 ;
 <i>Re Hyderbhai Hussenhbai</i> (1928)
 52 Bom. 126, 106 I. C. 36, ('27)
 A. B. 633 ; <i>Wor Lee Lone & Co.</i>
 <i>v. V. E. R. M. V. Chettyar Firm</i>
 (1929) 7 Rang. 815, ('29) A. R.
 313.</p> <p>(s) See <i>Ex parte Pearson</i> (1873) L. R.
 8 Ch. App. 667, a case under s. 6
 (5) of the Bankruptcy Act of 1869.</p> <p>(t) <i>Soonabai v. Tribhuvandas</i> (1908) 32
 Bom. 602 ; <i>Degumbar v. Ashutos</i></p> | <p>(1890) 17 Cal. 610 ; <i>Saw Durmay</i>
 <i>v. Baggah Singh</i> (1925) 3 Rang.
 213, 90 I. C. 969, ('25) A. R. 351.</p> <p>(u) <i>Ex parte Caucasian Trading Cor-</i>
 <i>poration</i> (1896) 1 Q. B. 368.</p> <p>(u1) These words were first introduced
 by the B. A., 1890.</p> <p>(v) <i>Ramsahai Mull v. Joyal</i> (1928) 32
 C.W.N. 608, ('28) A. C. 840. See
 <i>Tribhuvandas v. Jivachand</i> (1911)
 35 Bom. 196, 8 I. C. 179.</p> <p>(w) <i>Ex parte Brooke</i> (1874) L. R. 9 Ch.
 App. 301.</p> |
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124. Sale pending adjudication.—The clause now under consideration is intended to apply to a person who is responsible for the payment of his own debt and not to a person against whom an order of adjudication is taking operation. Therefore a sale of a debtor's property, pending an adjudication order against him which he has applied to annul, in execution of a decree against him, does not constitute a fresh act of insolvency, although the adjudication is subsequently annulled. *A* is adjudged insolvent in July 1926 on the petition of *B*. He then applies for an annulment of the adjudication. Pending the application one of *A*'s properties which he had mortgaged to *C* is sold in execution of a mortgage decree, the Official Assignee being made a party to the suit. The adjudication is annulled in February 1927. *B* then presents a fresh petition for adjudging *A* insolvent, the petition being founded on the sale as an act of insolvency. The sale is not an act of insolvency, it having been made during the subsistence of the adjudication, though the adjudication was subsequently annulled. It is true that under sec. 23 of the Presidency-towns Insolvency Act [Provincial Insolvency Act, sec. 37], where an adjudication is annulled, it is as though it had never been made, and the property of the insolvent vests in him retrospectively, but this cannot be a ground for treating an execution-sale pending adjudication as an act of insolvency (x).

125. Decree against partners.—Where a firm consists of two or more partners, and a decree is passed against the firm or the members thereof for a partnership debt, it is not sufficient, to adjudicate one of the partners insolvent, that the separate property of the other partner or partners has been attached or sold. It is the property of the partner sought to be adjudged insolvent that should have been attached or sold (y). But it is otherwise if the property attached or sold belongs to the firm (z).

(f) *Petition by debtor for adjudication.*

[*P.-t. I. A.*, s. 9 (f); *Prov. I. A.*, s. 6 (f).]

125A. Debtor's petition.—A debtor commits an act of insolvency if he petitions to be adjudged insolvent. The presentation of a petition by the debtor is in itself an act of insolvency (a). It does not cease to be so even if the petition is dismissed, and any creditor may present an insolvency petition against the debtor founded on this act of insolvency; but it must be done within three months from the date on which the debtor presented his petition (b).

- (x) *Lachmi Chand v. Bepin Behary* (1928) 32 C. W. N. 716, ('28) A. C. 644.
- (y) *Harischandra Mukherjee v. The East India Coal Co., Ltd.* (1912) 16 C.W.N. 733, 14 I. C. 576; *Ramasankara Aiyar v. Krishna Aiyar* (1926) 51 Mad. L. J. 326, 97 I. C. 393, ('26) A. M. 976

- (z) 51 Mad. L. J. 326, 97 I. C. 393, ('26) A. A. 976, *supra*.
- (a) See also *P.-t. I. A.*, s. 10; *Prov. I. A.*, s. 7.
- (b) *Jamal Din v. Vishambar Dial* ('29) A. L. 72, 109 I.C. 578. See also *P.-t. I. A.*, s. 11 (1) (c); *Prov. I. A.*, s. 9 (1) (c).

(g) *Notice of suspension of payment.*

[*P.-t. I. A., s. 9 (g) ; Prov. I. A., s. 6 (g).*]

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126-129**

126. Notice of suspension of payment.—A debtor commits an act of insolvency if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts. This act of bankruptcy was first introduced into the English law by the Bankruptcy Act, 1883 (c).

127. What is notice.—The Act does not require any particular form of notice. Nor does it require that it should be in writing. A verbal statement will do, but whether verbal or written, it must amount to a notice (d). The word “notice” cannot be made clearer than it is by any verbal explanation (e). A mere casual conversation, not intended to convey to the mind of the creditor that the debtor was about to suspend payment, will not be sufficient (f). The notice must be given to a creditor or creditors or his or their representative (g). A person whose only right is to bring an action for damages is not a creditor (h).

A letter sent by a debtor to his creditors amounting to a notice of suspension is admissible as proof of this act of insolvency, though expressed to be “without prejudice.” The reason is that the rule which excludes documents marked “without prejudice” does not apply unless there is a dispute or negotiations and terms are offered for the settlement of the dispute. Moreover, the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed, whether he accepts the offer contained in it or not (i).

128. What is suspension of payment.—The notice must amount to a declaration that the debtor has suspended, or that he is about to suspend payment of his debts. Suspension of payment is a business term usually applied to traders ; it means failure to meet one’s engagements and to pay debts in the ordinary course of business as they become due and payment is called for (j). The expression “suspended payment of his debts” means the entire suspension of his whole indebtedness and a general intention to stop payment to every creditor. A refusal to pay creditors whose debts are disputed is not a suspension of payment (j1).

129. Notice of suspension.—What the section requires is *notice* of suspension of payment. Therefore, mere suspension of payment will not suffice. There must be a notice of suspension (j2), that is, a statement which is intended to give the creditor to understand that the debtor has in fact suspended payment (j3).

(c) S. 4 (1) (h), now B. A., 1914, s. 1 (1) (h).

(d) *Ex parte Nickoll* (1884) 13 Q.B.D. 469; *Narain Das v. Chimman Lal* (1927) 49 All. 321, 102 I. C. 191, ('27) A. A. 266.

(e) *Clough v. Samuel* (1905) A.C. 442, 444.

(f) *Ex parte Oasler* (1884) 13 Q.B.D. 471.

(g) *Maharaj Kishore Khanna v. Netherlands Trading Society* (1929) 34 C. W. N. 401 [counsel]; *Re A Debtor* (1929) 1 Ch. 362 [solicitor's

managing clerk].

(h) *Re Miller* (1901) 1 Q. B. 51.

(i) *Re Daintrey* (1893) 2 Q.B. 116.

(j) *Re Lamb* (1887) 4 Morr. 25, 32.

(j1) *Narain Das v. Chimman Lal* (1927) 49 All. 321, 102 I.C. 191, ('27) A.A. 266.

(j2) *Vassanji v. Mulji* (1926) 50 Bom. 624, 96 I.C. 435, ('26) A.B. 405; *Bulomal v. Sumar Khan* ('28) A. S. 177.

(j3) *Re A Debtor* (1929) 1 Ch. 362, 372-373.

It is important to note that suspension of payment is something different from and over and above inability to pay (*k*). A statement made by a debtor to a creditor that he is unable to pay his debts does not of itself and without reference to context or circumstances amount to a notice that he has suspended or is about to suspend payment of his debts so as to constitute an act of insolvency within the meaning of this section (*l*). Such a statement may in one set of circumstances be merely a statement that he cannot pay, but in another set of circumstances to which one is entitled to look for the purpose of interpreting words that are not words of art, it may clearly mean to any ordinary human being listening to it, that he is stating that he has not the intention of paying his debts when they become due (*m*). "The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts—that is to say, to abstain from paying his debts as they fall due, at least for a time" (*n*).

130. Temporary suspension.—There may be an act of insolvency, though the suspension indicated in the notice is only temporary. Dealing with this question, Lord Selborne said: "To 'suspend' in its natural signification rather means something which may not be permanent than that which necessarily is so. A perpetual stoppage of payment would be a suspension and something more; but to say (*o*) that the word 'suspension' means nothing, in its context, but a necessarily permanent stoppage of payment, is a proposition to which I cannot agree. A stoppage of business in the ordinary course, and of the payment of debts in the ordinary course, is so serious a thing in many if not in all businesses, certainly for example in the business of a banker, that the legislature might well consider it a sufficient reason for giving the creditors the power of treating it as an act of bankruptcy in itself, without entering into the question whether in conceivable circumstances and by conceivable methods it might not come to an end and business be resumed. I cannot but think that it would be doing violence to these words if a suspension of payments *de facto*, whether in circumstances which might make it possible to resume them or in circumstances which might make that impossible, were held not to be enough" (*p*).

131. Test.—The test whether or not a notice amounts to an act of insolvency under this clause, lies in the effect which the notice would produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors. If the language of the notice can only lead the

(*k*) *Clough v. Samuel* (1905) A. C. 442, 444, 448; *Re Lamb* (1887) 4 Morr. 25, 32; *Durga Ram v. Har Kishen Dass* (1925) 23 All. L. J. 536, 88 I. C. 440, ('25) A. A. 564; *Mercantile Bank of India, Ltd. v. Official Assignee* (1916) 39 Mad. 250, 259, 35 I. C. 942.
(*l*) *Ex parte Oastler* (1884) 13 Q. B. D. 471; *Crook v. Morley* (1891) A. C. 316, 320; *Vassanji v. Mulji* (1926) 50 Bom. 624, 96 I. C. 435, ('26)

A. B. 405.
(*m*) *Re A Debtor* (1929) 1 Ch. 362, 371-372.
(*n*) *Re Reis* (1904) 2 K. B. 769, 779, affmd. sub nom. *Clough v. Samuel* (1905) A. C. 442.
(*o*) It was so said in *Re Fleming* (1888) 60 L. T. 154.
(*p*) *Crook v. Morley* (1891) A. C. 316, 319; *Re David Sassoon and Co.* ('20) A. S. 246, 249, 95 I. C. 453

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creditor to infer that, if an offer of composition made by the debtor is not accepted, suspension is the only alternative, it amounts to a notice that the debtor is about to suspend payment of his debts (g). Thus where a debtor issues a circular to his creditors offering a composition of ten shillings in the pound, and intimates that unless it is accepted by all the creditors, "there is no alternative but to seek the protection of the Court of Bankruptcy," it is a notice of suspension; for when a debtor says that unless the composition offered by him is accepted, he will go into the Court of Bankruptcy, he renders inevitable the inference that he does not intend to go on meeting his engagements in the ordinary business way (r). Similarly, a circular making an offer of five shillings in the pound, and stating that the debtor has no other property, and adding that "it is not his intention to go again into business, or to look for a situation," is a notice within this clause, for in such a case no alternative is offered but suspension (s). On the same principle an offer by a debtor at a meeting of creditors of a scheme providing for part payment of the debts by instalments and satisfaction of the remainder by allotment of shares in a company controlled by the debtor, with the verbal intimation that if the scheme be not accepted, "it would be a bad thing for the creditors," is a notice of suspension (t). A request by a trader, who was unable to pay for and take delivery of goods, to his creditors either to accept three annas in the rupee of their estimated claim or to wait till the market improved, was held to amount to a notice that he was about to suspend payment (u). An offer of composition, however, may be so worded as not to lead to an inference of suspension of payment, in which case it will not be treated as a notice of suspension (v). A declaration of inability followed by negotiations by the debtor with particular creditors as regards their particular debts, does not amount to a notice that the debtor is about to suspend payment (w).

Where a judgment-debtor who is arrested in execution of a decree is brought up before the Court and he intimates to the Court in the presence of the decree-holder or his counsel that he would apply to be declared an insolvent within one month, and asks for his release under sec. 55 (4) of the Code of Civil Procedure, 1908, his statement amounts to a notice that he is about to suspend payment (x).

Where a trade-debtor by circular, summons his creditors to a meeting to consider his affairs, he thereby gives notice that he will not in the meanwhile pay any individual creditor. This is notice of a temporary

(g) *Crook v. Morley* (1891) A. C. 316, 321; *Clough v. Samuel* (1905) A. C. 442; *Re Lamb* (1887) 4 Morr. 25, 32-33; *Re A Debtor* (1929) 1 Ch. 362.

(r) *Re Wolstenholme* (1885) 2 Morr. 213; *Re Lamb* (1887) 4 Morr. 25, 34; *Re Johns* (1893) 10 Morr. 190; *Re Waite* (1894) 1 Mans. 512.

(s) *Re Lamb* (1887) 4 Morr. 25.

(t) *Re Midgley* (1913) 108 L. T. 45.

(u) *Re David Sassoon and Co.*, (26) A.S. 246, 95 I. C. 453.

(v) *Re Walsh* (1885) 2 Morr. 112. See this case explained in *Re Lamb*

(1887) 4 Morr. 25, at p. 30. See also *Re Phillips* (1897) 76 L. T. 531, where it was held that it was no act of bankruptcy if the debtor said to the creditor, "If you do not continue to supply me with bricks, I shall not be able to carry out my contracts and shall have to stop payment."

(w) *Clough v. Samuel* (1905) A. C. 442, affirming s. c. sub nom. *Re Reis* (1904) 2 K. B. 769.

(x) *Maharaj Kishore Khanna v. Netherlands Trading Society* (1930) 34 C. W. N. 101.

suspension of payment and amounts to an act of insolvency (*y*). The most typical case on this subject is *Crook v. Morley* (*z*). In that case a debtor sent to his creditors a letter in these terms: "Being unable to meet my engagements *as they fall due* I invite your attendance at" (a specified place and time) "when *I will submit a statement of my position for your consideration and decision*". It was held by the House of Lords that the letter would naturally induce the creditors to believe that the debtor intended to suspend payment of his debts and therefore amounted to a notice that he was about to suspend payment of his debts. A similar circular issued by a *non-trader* would not necessarily be an act of insolvency. Where, for example, such a circular was issued by a physician, it was held that it did not constitute a notice of suspension. Phillimore, J., said: "We have to consider what effect this circular, issued by a non-trader following a lucrative profession and earning a good deal of money by his skill, would have on the minds of his creditors who received it. A trader who cannot meet his business obligations must cease to do business, but a surgeon who owes moneys to his creditors need not cease from carrying on his professional duties, and I do not think any of his creditors would infer from the circular that he intended to do so" (*a*). See para. 134 below.

132. Estoppel.—A creditor who has been a party or privy to a deed of transfer for the benefit of creditors is estopped from setting up a circular leading up to the transfer as an act of insolvency under cl. (a) of the section (*b*).

133. Notice by agent.—See para. 136 below, "Act of insolvency committed by agent".

134. Non-traders.—Though this clause applies both to traders and non-traders, there is some difference between the position of the two, for what would be notice of suspension in ordinary course in the case of a trader is not necessarily so in the case of a non-trader (*c*). See para. 131, sub-para. (3).

(h) *Imprisonment in execution of money decree.*

[*P.-t. I. A.*, s. 9 (*h*); *Prov. I. A.*, s. 6 (*h*).]

135. Remaining in prison.—A debtor commits an act of insolvency if he is imprisoned in execution of the decree of any Court for the payment of money. Lying in prison was first made an act of bankruptcy by 1. Jac. 1, and it was included in subsequent Bankruptcy Acts, the period of

- (y) *Crook v. Morley* (1891) A. C. 316; *Re Simonson* (1894) 1 Q. B. 433; *Re Dagnall* (1896) 2 Q. B. 407; *Re Selwood* (1894) 1 Mans. 66; *Re A Debtor* (1929) 1 Ch. 362; *Gurmukh Singh v. Ram Ditta Mal*, ('29) A. L. 136, 112 I. C. 132.
- (z) (1891) A. C. 316, affirming 24 Q. B. D. 320. "I also think that the effect of the notice of suspension

of payments is not impaired by the suggestion that he may resume payments, in the event of his creditors making arrangements which will permit of his so doing:" *ib.*, p. 324, per Lord Watson.

- (a) *Re A Debtor* (1912) 106 L. T. 812.
(b) *Re Thomas Hawley* (1897) 4 Mans. 41.
(c) *Re Scott* (1896) 1 Q. B. 619.

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imprisonment varying in different statutes. The last Bankruptcy Act in which it appeared was that of 1849, and the term of imprisonment to constitute it an act of bankruptcy was two months. Then came the Debtors Act, 1869, by which imprisonment for debt except in a few cases was abolished, and lying in prison ceased to be an act of bankruptcy under the Bankruptcy Law of England.

In India lying in prison was declared by the Indian Insolvency Act, 1848, to be an act of insolvency, in the case of non-traders by sec. 8, and in the case of traders by sec. 9 of the Act, the term of imprisonment to constitute an act of insolvency being twenty-one days. No term of imprisonment is specified either in the Presidency-towns Insolvency Act or the Provincial Insolvency Act. In a Bombay case which was under sec. 9 of the Indian Insolvency Act, 1848, it was held that the petition could be presented even after the discharge of the debtor from prison (d). In a later Bombay case which was under sec. 8, it was held that the petition must be presented while the debtor was still in prison (e). The former decision, it is submitted is not correct. Nothing turned upon the difference in the language of the two sections, the material words in both being the same. The words used in the present section are "if he is imprisoned." These words show that the debtor must be in prison at the time of the presentation of the petition. An insolvency petition against a debtor founded on this act of insolvency cannot be presented after he had been discharged from prison (f). Under the Indian Insolvency Act, 1848, sec. 8, it was held that the only person who could obtain an order of adjudication against a debtor on the ground of his lying in prison was the creditor in execution of whose decree he had been imprisoned (g). This decision turned on the language of sec. 8 of that Act. No such limitation is imposed either by the Presidency-towns Insolvency Act, or the Provincial Insolvency Act.

Act of insolvency committed by agent.

[P.-t. I. A., s. 9, *Expln.*; Prov. I. A., s. 6, *Expln.*]

136. Act of insolvency committed by agent.—The Explanation to sec. 9 of the Presidency-towns Insolvency Act says that "the act of an agent may be an act of the principal, even though the agent have no specific authority to commit the act." The words "even though the agent have no specific authority to commit the act" do not occur in the Provincial Insolvency Act. This, however, does not make any difference in substance. If the agent has specific authority to commit an

(d) *In the matter of Thucker Bhagwan-das Harjivan* (1880) 4 Bom. 489.

(e) *Re Ahmed Ismail Munshi* (1902) 26 Bom. 649.

(f) See P.-t. I. A., s. 11 (a); Prov. I. A. s. 11.

(g) *Re Ahmed Ismail* (1902) 26 Bom. 649.

act of insolvency, his act will be the act of the principal even without the Explanation. It is only when the agent has no specific authority that the question arises whether his act is by imputation the act of the principal. Para. 136

The words used are "may be", and not "is". This clearly shows that an act of insolvency committed by an agent is not in all cases the act of the principal. To impute the agent's act to the principal, it is necessary—

- (i) that the act must be one which the principal has authorised ; or
- (ii) that the act must have been done by an agent who represents the business so entirely that the beneficial owners have no practical control over it ; in other words, the agent occupies a position such that the principal must stand or fall by his acts, so that his acts are by imputation the acts of the principal, as pointed out in the Privy Council case of *Kastur Chand v. Dhanpat Singh* (h), referred to below.

In England the act of bankruptcy must be a personal act, and could not be committed by the act of an agent which the principal had not authorised and of which he had no cognizance. In other words, the only case in which an act of bankruptcy committed by an agent could be imputed to the principal is where the act was expressly authorised by him and was one of which he had cognizance (i). It has thus been held in England that if a firm of accountants acting under instructions from the debtor sends out a circular to the creditors, which amounts in effect to a notice of suspension of payment, the act of the accountants is the act of the debtor, and the debtor may be adjudged bankrupt on that act (j). Similarly, it has been held in India that if an agent stops payment and departs from the usual place of business under instructions from his principal, the act of the agent is the act of the principal (k). While, however, the English law does not impute an act of bankruptcy committed by an agent to the principal except in the case mentioned above, the Indian law does so in other cases also, those being cases where the agent occupies such a position that the principal must stand or fall by his acts. This is a distinct departure from the English law, and obviously a necessary one. In India there is a class of agents called gomashtras. These gomashtras do not always occupy the bare position of an agent. There are many firms in India which are exclusively managed by them. The beneficial owners have no practical control over the firm

- (h) (1896) 22 I. A. 162, 23 Cal. 26.
- (i) *Ex parte Blain* (1879) 12 Ch. D. 522, 529; *Cooke v. Charles A. Vogeler Co.* (1901) A. C. 102.
- (j) *Re Lamb* (1887) 4 Morr. 25. See also *Re Hiralal Shiv Narain*, ('27) A. S. 18, 97 I. C. 446.
- (k) *In the matter of Brijmohan Dobay* (1897) 2 C.W.N. 306, a case under

the I. I. A., 1848. In *Kallianji v. The Bank of Madras* (1916) 39 Mad. 693, 699, 31 I. C. 583 it was wrongly supposed, as pointed out in *Gopal Naidu v. Mohanlal* (1925) 49 Mad. 189, 198, 91 I. C. 874, ('26) A. M. 206, that it was a decision under the Prov. I. A. 1907.

Para. 136 and they are unknown to the customers. This was recognised by their Lordships of the Privy Council in *Kastur Chand's* case referred to above, and their Lordships refused to accept the view taken by the Calcutta High Court that the only case in which an act of insolvency committed by an agent could be imputed to the principal was where the act was expressly authorised by him or was one of which he had notice. The Explanation to the section gives effect to the observations of their Lordships. We now proceed to consider the subject in greater detail.

In *Re Hurruck Chund* (l), it was held by the High Court of Calcutta that the act of a gomashtha may be the act of his principal within the meaning of sec. 9 of the Indian Insolvency Act, 1848. This decision was dissented from by the same High Court in *Re Dhanpat Singh* (n), which was a case under the same Act. It was held in that case, following the English law, that a man cannot commit any act of insolvency by an act of his agent which he has not authorized and of which he had no cognizance, meaning thereby that for the act in question to be the act of the principal the agent must have specific authority, and that the authority cannot flow out of his general position. The case was taken on appeal to the Privy Council *sub. nom. Kastur Chand v. Dhanpat Singh* (n). Their Lordships refused to assent to the principle laid down by the High Court, and approved the decision in *Re Hurruck Chund*. Their Lordships observed that the act of an agent *may* be the act of the principal, even though the agent have no *specific* authority to commit the act, and that the authority to commit the act can flow out of the agent's general position.. Their Lordships said: "The position of a gomashtha differs in different cases. In some cases he may be little more, or no more than an ordinary manager. In others, he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. And it is a question in each case whether the gomashtha occupies such a position that the owner must stand or fall by his acts, so that his fraud or his flight shall by imputation be the fraud or the flight of the owner or multitude of owners, for the purpose of bringing their case within the statute of insolvency" [that is the Indian Insolvent Act, 1848]. In *Kastur Chand's* case the principal had his office and business at Azimgunge, and he carried on business also at Calcutta through a gomashtha. The principal took an active part in the business at Calcutta as a responsible owner, and he occasionally came to the office at Calcutta. His residence and head office at Azimgunge were well known, and when difficulties arose, he was applied to by the gomashtha to meet them. The gomashtha suspended payment at Calcutta, and when the creditors came for inquiry, he told them that he had communicated with his principal and that

(l) (1880) 5 Cal. 605 [a case under I.L. A., 1848].

(m) (1893) 20 Cal. 771 [a case under

I. I. A., 1848].

(n) (1896) 22 I. A. 162, 23 Cal. 26.

he was coming, and he asked them to wait until he came. Upon these facts their Lordships held, agreeing with the High Court, that the gomashtha *was no more than an ordinary agent and manager* and that he did not occupy such a position as to make the principal liable to be declared insolvent on the ground of the gomashtha's conduct. The conduct of the gomashtha sought to be imputed to the principal was that he stopped payment on the 6th February, 1883, and withdrew from the room in which the business was conducted to his own apartment in the same house. Such conduct, it was contended, amounted to a departure from the place of business with intent to defeat and delay the creditors; but it was found as a fact that he was accessible to all creditors either in the office or in the private room and their Lordships held, agreeing with the High Court, that there was no such departure. **Para. 136**

It will be seen from what is stated above that there is a distinction between an ordinary agent and an agent who has exclusive control of the business and occupies such a position that the principal must stand or fall by his acts. In the former case an act of insolvency committed by the agent is not the act of the principal. In the latter case an act of insolvency committed by the agent will be the act of the principal. Such act may consist in executing a transfer for the benefit of the creditors, or to defeat or delay creditors, or by way of fraudulent preference, or in departure from the principal's usual place of business (o). It may also consist in giving notice of suspension of payment of debts. An *ordinary* agent, as pointed out in *Kastur Chand's* case, cannot give such notice, for it is not within the ordinary scope of an agent's authority to commit an act of insolvency (p). The assumption by the High Court of Madras in *Kallianji v. The Bank of Madras* (q), that every act of insolvency committed by an agent is the act of the principal is obviously wrong. In a Calcutta case the agent of a firm in England in charge of a branch office in Calcutta closed the place of business in Calcutta and put up a notice that the firm had suspended payment. It was held upon the facts that the agent occupied such a position that his principals must stand or fall by his acts, and that his departure should by imputation be regarded as the departure of his principals (r). It is a question of fact in each case whether the agency is of the ordinary kind, in which case the act to bind the principal must have been expressly authorized by him, or whether it is of the special kind described in *Kastur Chand's* case, in which case the authority to commit the act flows out of the general position of the agent.

(o) *Kastur Chand v. Dhanpat Singh* (1896)
23 Cal. 26, 36, 22 I. A. 162.
(p) *Muthu Chettiar v. Nagindas* (1926)
28 Bom. L. R. 680, 98 I. C. 431,
(26) A. B. 383.

(q) (1916) 39 Mad. 893, 700, 31 I. C. 583.
(r) *In the matter of William Watson*
(1904) 31 Cal. 761, 779, a case
under the I.I.A., 1848.

Para. 137

137. Partner as agent.—Under the English law the act of bankruptcy must be a personal act and it could not be committed by the act of an *agent* which the debtor had not authorised and of which he had no cognizance (s). According to that law, to support an adjudication against a firm, each of the partners must have committed some act of bankruptcy. Such act may be a joint act of bankruptcy; but it is not requisite that they should have committed a joint act of bankruptcy, or that they should all have committed an act of bankruptcy of the same kind. If, however, a joint act of bankruptcy is relied upon, it must be shown to be the act of all (t). Thus where one of three partners in a banking concern who resided at the place where the banking house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking house, shut it up and stopped payment, it was held that this was no evidence of a joint act of bankruptcy by all three (u). These principles have been followed by the Courts in India. It has thus been held that if one of two partners departs from his usual place of business with intent to delay and defeat the creditors of the firm, an adjudication order cannot be made against the firm, even though the departing partner was the managing partner and the other partner was residing at a distance (v), unless the other partner also has departed with the like intent or done some other act of insolvency (w). Similarly, if property belonging to two out of three partners has remained under attachment in execution of a decree against them all for twenty-one days, the third partner not having any interest in the property, the act of insolvency arising out of the attachment is the act of the two to whom the property belongs, and the third partner cannot be adjudged insolvent on account of that act, but only the two partners to whom the property belonged, there being no act of insolvency on the part of the third partner (x). In a Sind case it was held that where one partner gives notice that his firm has suspended payment, it is *prima facie* a joint act on behalf of all the partners, and that the burden lies upon the other partners to show that they were solvent and able to pay the debts of the firm for which they were liable (y). This view, it is submitted, is not correct. "There is no *prima facie* joint act of insolvency in such a case, and no burden lies in the first instance upon the other partners. The cardinal rule applicable to all

(s) *Ex parte Blain* (1879) 12 Ch. D. 522.

(t) *Mills v. Bennett* (1814) 2 M. & S. 556, 105 E. R. 488; *Hogg v. Bridges* (1818) 8 Taunt. 200, 129 E. R. 360. See para. 90 above.

(u) *Mills v. Bennett* (1814) 2 M. & S. 556, 105 E. R. 488.

(v) *Gopal Naidu v. Mohanlal* (1920) 49 Mad. 189, 91 I.C. 874, ('26) A.M.

206.

(w) *Re Mahomed Hasham & Co.* (1922) 24 Bom. L. R. 861, 75 I.C. 203, ('23) A. B. 107.

(x) *Harish Chandra Mukherjee v. The East India Coal Co., Ltd.* (1912) 16 C.W.N. 733, 14 I.C. 576.

(y) *Re David Sassoon & Co., Ltd.*, ('27) A. S. 153, 100 I.C. 389.

acts of insolvency is that the burden of proving an act of insolvency lies on the person who alleges it (2). The actual decision, however, is correct for it was found as a fact that the notice was given with the knowledge and consent of the other partners. **Para. 137**

(2) *Ex parte Geisel* (1882) 22 Ch. D. 436, 438; *Harish Chandra Muk-* | *herjee v. The East India Coal Co., Ltd.*
(1912) 16 C.W.N. 733, 735, 14 I.C. 576.

B.—PRINCIPLES COMMON TO ACTS OF INSOLVENCY.

Para. 138. 138. Principles common to all acts of insolvency.—Having dealt with the several acts of insolvency it may be as well to point out some general principles common to all acts of insolvency.

1. *Acts of insolvency as foundation of jurisdiction.*—It is the act of insolvency, and not the insolvency petition, which gives jurisdiction to the Insolvency Court (a).

2. *Acts of insolvency a creation of statute.*—Nothing can be deemed an act of insolvency which is not made such by statute. There is no such thing as an act of insolvency except that which the statute declares to be one, not even if the consequences of the act may be precisely the same as those of an act of insolvency (b). Thus if a merchant dishonours all his bills, not being able to meet them, it does not constitute an act of insolvency, though it may rightly be said that he is in insolvent circumstances. If, however, he gives notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts, it amounts to an act of insolvency. See cl. (g) of the section.

3. *Act of insolvency must be committed in British India.*—Every act of insolvency must be committed in British India unless otherwise provided by statute (c). It is so provided in clauses (a), (b) and (c) of the section.

4. *Act of insolvency is personal.*—Under the English law an act of bankruptcy must be the personal act or default of the person to be made bankrupt. Thus a firm as such cannot commit an act of bankruptcy. Nor can a man commit an act of bankruptcy by a particular act of his agent which he has not authorised and of which he has no cognizance (d). It is different, however, in India. In India, an act of insolvency may be committed by a firm as such (e). It may also be committed by an agent even if he has no specific authority, provided the agent occupies such a position that his principal must stand or fall by his acts (f).

5. *Act of insolvency cannot be purged.*—An act of insolvency, once committed, cannot be purged by subsequent circumstances. Thus if a debtor, being unable to pay his debts, gives instructions to his servant to say to a creditor, if he comes and asks for payment, that he is not at home, and the servant does so, the debtor commits an act of insolvency within cl. (d) (iii) of the section, and he cannot purge

(a) *Ex parte Crispin* (1873) L. R. 8 Ch. App. 374, 379.

(b) *Dutton v. Morrison* (1810) 17 Ves. 193, at pp. 196, 197, 198, 34 E. R. 75 at pp. 76, 77; *Re Beeston* (1899) 1 Q. B. 626, 631-632; *Vasanji v. Mulji* (1926) 50 Bom. 624, 96 I.C. 435,

(c) (1876) A. B. 405.

(c) *Inglis v. Grant* (1794) 5 T. R. 530, 101 E. R. 298.

(d) *Ex parte Blain* (1879) 12 Ch. D. 522, 529.

(e) See para. 90.

(f) See para. 136.

it by subsequently taking a loan from his friend and paying that creditor, though the payment may be made on the same day. In such a case, any other creditor may present an insolvency petition against him founded on that act of insolvency against the debtor (g). Para. 133

6. *Voluntary and involuntary acts.*—An act of insolvency may be the voluntary act of the insolvent himself, e.g., a transfer with intent to defeat creditors, or it may be involuntary, e.g., a sale or attachment of his property in execution of a decree for the payment of money. In the former case the act of insolvency dates from the time when it is begun; in the latter case from the time when it is completed (h). See para. 121 above.

7. *Act of insolvency must have been committed within three months before presentation of petition.*—In the case of a creditor's petition, the act of insolvency on which the petition is founded must have been committed within three months before the presentation of the petition (i).

8. *Transfers which are in themselves acts of insolvency.*—Of the various kinds of transfers of property which a person may execute there are only three which are declared by statute to be acts of insolvency, namely, (1) a transfer by a debtor for the benefit of his creditors generally within cl. (a) of the section, (2) a transfer with intent to defeat or delay creditors within cl. (b), and (3) a transfer by way of fraudulent preference within cl. (c). Neither a transfer for the benefit of creditors nor a transfer by way of fraudulent preference is void in itself, but if an insolvency petition is presented within three months from the date of the transfer and the transferor is adjudged insolvent, the transfer is void as against the Official Assignee or Receiver as representing the general body of creditors. If no petition is presented within three months, the transfer cannot afterwards be impeached as an act of insolvency available for a petition, nor in any other way under the insolvency law (j). In *Ex parte Games* (k), Thesiger, L.J., said: "It appears to me that no consequence whatever can follow from an act of bankruptcy of which the creditors might have availed themselves if they had applied in time, but of which they did not avail themselves as an act of bankruptcy within the time limited by the Bankruptcy Act."

A transfer, however, with intent to defeat or delay creditors stands on a different footing. Such a transfer may be fraudulent as against the creditors of the transferor in two ways. It may be fraudulent only as an act of insolvency within the meaning of sec. 9 (b) of the Presidency-towns Insolvency Act and sec. 6 (b) of the Provincial Insolvency Act. It may also be fraudulent in some cases within the meaning of sec. 53 of the Transfer of Property Act, 1882. If the transfer amounts only to an act of insolvency, it may be availed of as an act of insolvency by any creditor within three months from the date thereof. If it is so availed of, and the

(g) *Colkett v. Freeman* (1787) 2 T. R. 60, 100 E. R. 33.

(h) *Ex parte Villars* (1874) L. R. 9 Ch. App. 432, 445.

(i) *Sohan Lal v. Sheo Nath* (1928) 26 All. L. J. 941, 111 I. C. 136, ('28) A.

A. 676. See P.-t. I. A., s. 12 (1) (c); Prov. I. A., s. 9 (1) (c).

(j) *Allen v. Bonnett* (1870) L. R. 5 Ch. App. 577, 582.

(k) (1879) 12 Ch. D. 314, 324.

Para. 138 transferor is adjudged insolvent, the transfer, being in itself an act of insolvency, is void as against the Official Assignee or Receiver. After the expiration of three months it cannot be impeached as an act of insolvency, or in any other way under the insolvency law. It cannot be impeached even under any other law, unless it is voidable on the ground of fraud or misrepresentation or such other ground. But if the transfer is also fraudulent under the Transfer of Property Act, it may be availed of as an act of insolvency by any creditor within three months from the date thereof, in which case, the transfer being in itself an act of insolvency, is void as against the Official Assignee or Receiver. Even if it is not so availed of, and the transferor is adjudged insolvent on a petition founded on another act of insolvency committed more than three months after the date of the transfer, as for instance, departing out of British India with intent to defeat creditors, the Official Assignee or Receiver, as representing the general body of creditors, is entitled to impeach it, provided action is taken by him within the period prescribed by the law of limitation to impeach such a transfer (l). This he may do by an *application* to the Insolvency Court (m), or by a *suit* in a civil Court (n).

Summarizing the above, it may be said that every transfer which constitutes in itself an act of insolvency is void as against the Official Assignee or Receiver if insolvency supervenes within three months from the date of the transfer. If no insolvency supervenes within that period, the transfer cannot afterwards be impeached as an act of insolvency available for a petition nor in any other way under the insolvency law. But if the transfer is also fraudulent under the Transfer of Property Act, it is void as against the Official Assignee or Receiver even after the expiration of three months, if the debtor is adjudged insolvent on a petition founded on another act of insolvency subsequently committed by him. In *Allen v. Bonnett* (o), Lord Justice Giffard said: "It appears to me to follow from this section (p) that where there is a deed which cannot be set aside under the Statute of Elizabeth (q), or generally as fraudulent including in the term a fraudulent preference (r), *but solely and only as being an act of bankruptcy*, the lapse of twelve (s) months before any fiat issues validates that which would otherwise be impeachable; and that if a given transaction of this description

(l) *Allen v. Bonnett* (1870) L. R. 5 Ch. App. 577, 582; *Ex parte Villars* (1874) L. R. 9 Ch. App. 432, 443; *Ex parte Games* (1879) 12 Ch. D. 314, 324; *Manmohandas v. N. C. Mcleod* (1902) 26 Bom. 765.

(m) See P.-t. I. A., s. 7; Prov. I. A., s. 4.

(n) See para. 62A.

(o) (1870) L. R. 5 Ch. App. 577, 582.

(p) That is, s. 88 of B. A., 1849, which provided a period of 12 months. See P.-t. I. A., s. 12 (1) (c) and Prov. I. A., s. 9 (1) (c), which

provide a period of three months.

(q) Corresponding to s. 53 of the Transfer of Property Act, 1882.

(r) The case was decided under the B. A. of 1849. Fraudulent preference was first declared an act of bankruptcy by the B. A. of 1883, though it was treated as such in most cases under the earlier statutes.

(s) Under the Indian Acts the period is three months.

cannot be treated as a ground for adjudication, it cannot be treated as having the consequences of an act of bankruptcy in any sense or for any purpose". Para. 138

It has been stated above that a transfer which is in itself an act of insolvency is void as against the Official Assignee or Receiver if insolvency supervenes within three months from the date of the transfer. It follows from this that if a debtor transfers, his property for the benefit of his creditors generally, and he is adjudged insolvent within three months from the date of the transfer, the trustees of the deed of transfer will have to hand over the property to the Official Assignee or Receiver. Similarly, where property is transferred with intent to defeat or delay creditors or with a view to give a particular creditor preference over the other creditors, the transferee may be compelled to hand over the property to the Official Assignee or Receiver. A transfer, however, may come within the protected transaction section (t), in which case it will be protected although it may constitute an act of insolvency. Thus if a debtor sells the whole of his property with a view to abscond with the money, it will be an act of insolvency so far as the debtor is concerned, but a *bona fide* purchaser for value will be protected by that clause (u). Such cases, however, are very rare.

9. *Any creditor can found a petition on any act of insolvency.*—A petition can be presented by any creditor in respect of any act of insolvency committed by the debtor. But a creditor cannot rely upon a transfer for the benefit of creditors executed by the debtor as an act of insolvency, if he is a party or privy to it or has acquiesced in it. See para. 148 (16) below.

10. *Burden of proof.*—The burden of proving that a person has committed an act of insolvency lies upon him who alleges it (v).

(t) P.-t. I. A., s. 57; Prov. I. A., s. 55. | (v) *Ex parte Geisel* (1882) 22 Ch. D. 436,
(u) *Shears v. Goddard* (1896) 1 Q.B. 406. | at p. 438.

LECTURE V.

PART I.

PETITION AND ORDER OF ADJUDICATION.

Presidency-towns Insolvency Act [ss. 10-15].

**Paras.
139, 140**

139. Power to adjudicate (s. 10).—The scheme of the two Acts as regards procedure differs in some material respects. It is therefore proposed to consider the provisions of the two Acts separately. Part I of this Lecture is confined to insolvency petitions under the Presidency-towns Insolvency Act, and Part II to petitions under the Provincial Insolvency Act. At the same time there are certain provisions, such as consolidation and withdrawal of petitions, which are common to both the Acts, and they are considered together in Part III. Proceedings in insolvency are commenced by a petition presented either by a creditor or by a debtor. A creditor's petition must be founded upon a previous act of insolvency committed by the debtor. Where the debtor presents a petition against himself, the act of presentation is an act of insolvency.

There can be no order of adjudication except on a petition. It has accordingly been provided by sec. 10 of the Presidency-towns Insolvency Act that subject to the conditions specified in the Act (a), if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order called an order of adjudication adjudging him an insolvent.

140. Court to which petition should be presented (s. 11).—The Court has no jurisdiction to make an order of adjudication, unless—

- (a) the debtor is, at the time of the presentation of the insolvency petition, imprisoned in execution of the decree of a Court for the payment of money in any prison to which debtors are ordinarily committed by the Court in the exercise of its ordinary original jurisdiction ; or
- (b) the debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling-house or has carried on business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court ; or

(a) See P.-t. I. A., ss. 12 and 14.

- (c) the debtor personally works for gain within those limits ; or
- (d) in the case of a petition by or against a firm of debtors the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits.

**Paras.
140-142**

. **140A. Restriction on jurisdiction.**—Sec. 11 restricts the power of the Court to make an order of adjudication in the cases specified therein. The most important practical result is that a creditor may not present a petition against a debtor merely because the debtor has committed an act of insolvency while present on a passing visit in British India (b).

141. Imprisonment within jurisdiction.—To give the Court jurisdiction under sub-cl. (a) the debtor must have been not only arrested, but also imprisoned.

Though the attachment of a debtor's property is one of the facts which entitles him to present an insolvency petition (c), the mere fact that the property attached is situate within the jurisdiction of the Court to which a petition is presented will not give jurisdiction to that Court to entertain the petition. It is necessary that the debtor should be residing or carrying on business within the jurisdiction of that Court or that some one of the other conditions laid down in sec. 11 should be complied with.

142. Ordinarily resides or has a dwelling-house.—To give the Court jurisdiction under this section the debtor must have ordinarily resided within the jurisdiction within a year before the date of the presentation of the petition. This was the period prescribed by the Bankruptcy Act, 1883 (d), on which the Presidency-towns Insolvency Act is based, and the same period is prescribed by the Bankruptcy Act, 1914 (e). The condition as to the *period* of residence is important. It does not occur in sec. 16 of the Code of Civil Procedure, 1908, or in sec. 11 of the Provincial Insolvency Act. It is sufficient to give the Court jurisdiction, under the Code that the debtor "resides" within the jurisdiction, and, under the Provincial Insolvency Act, that the debtor "ordinarily resides" within the jurisdiction. Decisions, therefore, under the Code and the Provincial Insolvency Act must be accepted with caution. As to dwelling-house also the condition is that the debtor must have had it within a year before the date of the presentation of the petition. See para. 189 below.

What constitutes residence within the meaning of the Act is a question of fact in each case. English cases on the subject are instructive. Where a debtor, who was not domiciled in and had no dwelling-house or place of business in England, had for 18 months previous to the presentation of a bankruptcy petition against him retained a room at an hotel in London for which he

(b) See Dicey, Conflict of Laws, Rule 68. | (d) S. 6 (1) (d).
 (c) P.-t. I. A., s. 14 (1) (c). | (e) S. 4 (1) (d).

**Paras.
142-144**

paid continuously during that time, and was treated as an ordinary resident there, it was held that he had "ordinarily resided in England" within the meaning of the Bankruptcy Act, 1883, and that the creditor was entitled to present a bankruptcy petition against him (f). The same was held of a foreigner who in order to carry on an action stopped at hotels in England for nine months before the petition (g). Casual visits to London and residence in lodgings on such occasions have been held not to constitute "ordinary residence in England" (h). Where a debtor, who had resided in a house of his own in England, had gone to reside abroad, and abandoned the house as his residence more than a year before the presentation of a petition against him, and had not again adopted it as his residence, though he might at any time during the year, had he chosen to do so, have gone to reside in it, it was held that he could not be considered to have a "dwelling-house" in England within the period prescribed by the section (i). In *Re Hecquard* (j), a domiciled Frenchman, who had come to England to prosecute an action commenced by him in an English Court, took furnished rooms in a house in London which he occupied exclusively for three months with his wife and servants from March to June. During the three months he paid frequent visits to France and at the end of that period he returned to France. In September of the same year a bankruptcy petition was presented against him in the London Bankruptcy Court. It was held that he had a "dwelling-house" in England within a year before the date of the presentation of the petition within the meaning of the Act, and that the petition was properly presented against him.

143. Carrying on business.—The term "business" has a more extensive significance than "trade" (k). Any occupation for the purpose of making profits is "business" (l). A debtor does not cease to carry on business merely because he has closed his business. If business debts remain unpaid and assets have to be realised, he will be deemed to carry on business within the meaning of this section (m).

144. Carrying on business through an agent.—The business need not be carried on by the debtor in person. It may be carried on through an agent. The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal, and not a general agent who does business in his own name for any one who pays him. Business done by a general commission agent in his own name, though on behalf of undisclosed principals, is not business carried on through an agent (n).

- (f) *Re Norris* (1888) 5 Morr. 111.
 (g) *Re Bright* (1903) 19 T. L. R. 203.
 (h) *Re Erakine* (1893) 10 T. L. R. 32.
 (i) *Re Nordenfelt* (1895) 1 Q. B. 151.
 (j) (1890) 24 Q.B.D. 71.
 (k) *Smith v. Anderson* (1880) 15 Ch. D. 247, 259; *Rolls v. Miller* (1884) 27 Ch. D. 71, 85, 87.

- (l) *Re A Debtor* (1927) 1 Ch. 97.
 (m) *Gokuldoss Govardhandoss v. Parry & Co.* (1925) 48 Mad. 795, 91 I. C. 127, ('25) A. M. 1249.
 (n) *Re Reloomal Tolaram* ('29) A.S. 24, 112, I. C. 134; *Khimji Chaturbhuj v. Charles Forbes* (1871) 8 Bom. H. C. 102.

145. Adjudication of firm.—A petition may be presented by or against a firm if the firm has carried on business within a year before the date of the presentation of the petition within the limits of the Court. A firm will be deemed to carry on business so long as debts remain to be paid and assets remain to be realized. The mere fact that the firm was dissolved more than one year before the date of the presentation of the petition or that a receiver has been appointed of the assets of the firm in a suit by one of its members against the other members for partnership accounts is no bar to the adjudication of the firm (o). Where a firm has its principal office in one place and a subordinate office in another place, a petition may be presented against it in either place. As in the case of an individual, so in the case of a firm, the business of the firm may be carried on either by the proprietors or by their agents (p). See para. 90 above.

**Paras.
145, 146**

146. Presentation of petition to a wrong Court.—By sec. 98 (3) of the Bankruptcy Act, 1914, which provides for the local jurisdiction of the English Courts, it is enacted that nothing in that section will invalidate a proceeding by reason of its being taken in a wrong Court (q). Having regard to that provision it has been held that if a petition is by inadvertence presented in a wrong Court, the Court has jurisdiction to make a receiving order, and the proceedings can afterwards be transferred to the proper Court (r). If, however, the petition is wilfully presented in a wrong Court, it is a ground for dismissing it (s). There is no such provision in the Presidency-towns Insolvency Act. There is, however, a provision in the Provincial Insolvency Act contained in sec. 11 of the Act. By that section it is provided that no objection as to the place of presentment will be allowed in appeal or in revision unless the objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice. There was no such provision in the Provincial Insolvency Act, 1907. It was accordingly held under that Act that the provisions of sec. 21 of the Code of Civil Procedure, 1908, which applied to suits filed in a wrong Court, did not apply to insolvency petitions (t). It was to supersede that decision that the proviso was added in the Provincial Insolvency Act, 1920. There is no such provision in the Presidency-towns Insolvency Act.

(o) *Gokuldoss Govardhandoss v. Parry & Co.* (1925) 48 Mad. 795, 91 I. C. 127, ('25) A. M. 1249.

(p) *Chetandas Mohandas v. Ralli Brothers* ('25) A. S. 153, 83 I. C. 135.

(q) Same as s. 95 (3) of the B.A., 1883.

(r) *Re French* (1890) 24 Q.B.D. 63.

(s) *Ex parte May* (1885) 14 Q.B.D. 37.

(t) *Madho Pershaud v. A. L. Walton* (1913) 18 C. W. N. 1050, 20 I. C. 370.

I.—CREDITOR'S PETITION.

1.—Conditions on which creditor may petition.

P.-t. I. A., s. 12.

**Paras.
147, 148**

147. Requisites of creditor's petition (s. 12).—Assuming that an act of insolvency has been committed, and assuming that it has been committed by a person who is a “debtor” within the meaning of the Act, it by no means follows that any creditor can present a petition against him. A creditor is not entitled to present an insolvency petition against a debtor unless—

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to Rs. 500, and
- (b) the debt is a liquidated sum payable either immediately or at some certain future time, and
- (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

148. Who may be a petitioning creditor.—As a general rule, any person who has a right to take legal proceedings for the recovery of a debt may present an insolvency petition against the debtor.

1. *Joint creditors.*—Where a debt is due to several persons jointly, they must all join in the petition. Thus one of two partners is not by himself a good petitioning creditor in respect of a debt due to the firm (*u*), though where a petition is presented in the firm's name, his signature to the petition is sufficient. Similarly one of several joint judgment-creditors is not alone entitled to present an insolvency petition against the judgment-debtor (*v*).

2. *Partners : Firm.* [*P.-t. I. A., s. 99*].—A petition by a partnership firm may be presented in the name of the firm (*w*). Where the petition is filed by a firm in the name of the firm, it should contain the names in full of the individual partners, and should be accompanied by an affidavit made by the partner signing the petition showing that all the partners concur in filing it (*x*).

3. *Company.*—A company incorporated under the Indian Companies Act, 1913, may be a petitioning creditor (*y*). The petition must be in the

- (*u*) *Buckland v. Newsame* (1809) 1 Taunt. 477, 127 E. R. 919.
 (*v*) *Ananta Kumar v. Sadhu Charan* ('26) A. C. 234, 87 I. C. 751.
 (*w*) *P.-t. I. A., s. 99. See Re Wenham* (1900) 2 Q. B. 698.

- (*x*) Rules made under *P.-t. I. A.*—Calcutta Rule 150; Bombay Rule 153; Madras Rule 45.
 (*y*) *Ex parte Dan Rylands Ltd.* (1891) 64 L. T. 742.

name of the company. The liquidator of a company in course of winding up must petition in the name of the company (z). A company may petition against one of its shareholders (a). **Para. 148**

4. *Executor*.—An executor may petition on a debt due to the testator before taking out probate; but probate should be obtained before the order of adjudication is made. Also one of several executors may be a petitioning creditor (b).

5. *Married women*.—A married woman may present a petition in respect of a debt due to her for which she can sue in her own name (c).

6. *Minor*.—A minor can by a next friend present a petition in respect of a debt due to him, e.g., wages due to him (d).

7. *Lunatic*.—A lunatic so adjudged may present a petition in insolvency by a manager of his property appointed by the Court.

8. *Factor*.—A factor who has sold goods to a debtor in his own name may petition against him, because he might have sued for the amount in his own name (e).

9. *Trustee*.—A bare trustee may be a petitioning creditor, as where the beneficiary is under disability. But he cannot petition alone where the beneficial owner is not under any disability, and the beneficial owner must join in the petition, in accordance with the time-honoured rule of the Court of Bankruptcy which required not only the oath of the person to whom the debt was legally due that he had not been paid, but also the oath of any beneficial owner capable of receiving or releasing the debt (f). If, however, the trustee is himself beneficially entitled to part of the debt sufficient to support a petition, that is, Rs. 500 or upwards, he may present a petition on the debt without joining the beneficiary (g).

10. *Undischarged insolvent*.—An undischarged bankrupt who has obtained judgment in an action in respect of some personal wrong, may present a petition in respect of the judgment-debt, if the Official Assignee or Receiver has not intervened to claim the money (h).

11. *Assignee of a debt*.—Where a debt has been assigned in accordance with the provisions of sec. 130 of the Transfer of Property Act, 1882, the assignee can present a petition.

12. *Foreigner*.—A foreigner can present a petition in respect of a debt whenever he can sue for the debt (i).

(z) *Re Bassett* (1895) 2 Mans. 177.

(a) *Re Calthrop* (1876) L. R. 3 Ch. App. 252.

(b) *Ex parte Paddy* (1818) 3 Mad. 241, 56 E. R. 498; *Treasure v. Jones*, 1 Selwyn, N. P. 253.

(c) See Married Woman's Property Act, 1882, s. 7.

(d) *Ex parte Brocklebank* (1877) 6 Ch.

D. 358.

(e) *Sadler v. Leigh* (1815) 4 Camp. 195, 171 E. R. 63.

(f) *Ex parte Culley* (1878) 9 Ch. D. 307.

(g) *Re Gamgee* (1891) 64 L. T. 730.

(h) See *Rose v. Buckett* (1901) 2 K. B. 449.

(i) See *Ex parte Pascal* (1876) 1 Ch. D. 509, and C.P.C., 1908, s. 83.

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13. *Sole creditor*.—A man who is the only creditor of a debtor can present a petition against him. The mere fact that a man has only one creditor is not a sufficient ground for saying that insolvency proceedings cannot be maintained against him. The reason for this is that the Official Assignee or Receiver may be able to set aside transactions and get in assets which could not be set aside or got in without an adjudication of insolvency (j).

14. *Stock Exchange creditor*.—A Stock Exchange creditor of a defaulting member of the Stock Exchange can present a petition against him for the balance due to him, notwithstanding that the creditor has received a dividend from the Stock Exchange in the winding up of the debtor's affairs (k).

15. *Official Assignee or Receiver*.—The Official Assignee or Receiver may present a petition in respect of a debt due to the insolvent (l).

16. *Creditor privy to act of insolvency*.—A creditor who has been privy to an act of insolvency cannot present a petition founded on that act of insolvency. Thus a creditor who has assented to, acquiesced in, or has been a party or privy to a deed of transfer by the debtor of all his property for the benefit of his creditors, cannot rely upon it as an act of insolvency (m), unless the transfer is fraudulent as against him, as, for instance, on the ground of a secret preference given to another creditor (n), or a misrepresentation of his assets by the debtor (o). The burden of proof of assent is on the person who alleges it (p). Proof of actual assent is not necessary if the creditor has acquiesced in the transfer by intentionally taking advantage of it (q), or otherwise by his conduct (r). Delay on the part of the creditor in presenting a petition for the adjudication of the debtor or otherwise expressing dissent from the deed of transfer may amount to acquiescence, unless the delay can be satisfactorily explained (s). Mere attendance of the creditor or his representative at the meeting which refers to the deed does not amount to approval or assent (t). A creditor who has assented to a proposed deed of transfer may revoke his assent before the deed is executed (u).

(j) *Re Hecquard* (1889) 24 Q. B. D. 71, 76.

(k) *Mendelssohn v. Ratcliffe* (1904) A. C. 456.

(l) *Re Bagley* (1911) 1 K. B. 317.

(m) *Oliver v. King* (1851) 25 L. J. Ch. 427; *Ex parte Alsop* (1860) 29 L. J. Bk. 7; *Ex parte Stray* (1867) L. R. 2 Ch. App. 374; *Re Thomas Hawley* (1897) 4 Mans. 41; *Re Brindley* (1906) 1 K. B. 377; *Re Mills* (1906) 1 K. B. 389; *Rukmani Ammal v. Rajagopala Iyer* (1924) 48 Mad. 294, 84 I. C. 281, ('24) A. M. 839.

(n) *Ex parte Marshall* (1841) 1 M. D. & D. 575; *Danglish v. Tennent*

(1866) L. R. 2 Q. B. 49; *Ex parte Milner* (1885) 15 Q. B. D. 605.

(o) *Re Tanenburg* (1889) 60 L. T. 270, 6 Morr. 49.

(p) *Re Michael* (1891) 8 Morr. 305.

(q) *Re Michael* (1891) 8 Morr. 305.

(r) *Re Adamson* (1894) 2 Mans. 153; *Re Woodroff* (1897) 4 Mans. 46; *Re Sunderland* (1911) 2 K. B. 658.

(s) *Re Day* (1902) 85 L. T. 238; *Re Carr* (1902) 85 L. T. 552.

(t) *Re Carr* (1902) 85 L. T. 552; *Re Mills* (1906) 1 K. B. 389 *Re Bessley* (1913) 109 L. T. 910.

(u) *Re Jones Bros.* (1912) 3 K. B. 234.

Arrangements between a debtor and his creditors otherwise than in pursuance of the bankruptcy law are governed in England in certain cases by the Deeds of Arrangement Act, 1914. There is no such Act in India.

17. *Surety*.—A surety is entitled to present a petition against the debtor (v). A surety cannot present a petition against his co-surety unless he has paid more than his own proportion of the debt (w).

18. *Receiver*.—A receiver is entitled to present a petition, if he can sue in his own name, as where a judgment-debt is assigned to him, but not otherwise (w1).

19. *Benamidar*.—A benamidar can sue in his own name (w2), but it is doubtful whether he is entitled to present a petition (w3).

149. **Debt must exist before act of insolvency**.—The petitioning creditor's debt must have existed at the time of the act of insolvency (x). It must also have existed at the time of the presentation of the petition, and must have continued to exist at the hearing and down to the making of the order of adjudication (y). If there was a good petitioning creditor's debt at the time of the act of insolvency, it is immaterial that judgment has been subsequently obtained for it and it has become merged in the judgment (z). In a Madras case it was said that it was sufficient if the petitioning creditor's debt existed at the time of the presentation of the petition, and that it was not necessary that it should continue to exist at the time of the order of adjudication (a). This view does not seem to be correct.

150. **Amount of debt**.—The debt must be not less than Rs. 500 at the date of the act of insolvency; an accretion of the costs of a suit to recover the debt, after the date of the act of insolvency, will not be sufficient (b). An insolvency petition may be presented by a single creditor where the debt amounts to Rs. 500 or by two or more creditors if the aggregate amount of debts owing to such creditors amounts to Rs. 500. A bond for Rs. 500 upon which the debtor is jointly and severally liable with others is sufficient to support a petition for adjudication against the debtor (c). If a debt to the requisite amount is due to a creditor from a firm, he may present a petition against any one of the partners without joining the others (d).

151. **Debt must be liquidated**.—The debt must be a liquidated sum, although it may be payable either immediately or at some future time

(v) *Roderique v. Ramaswami Chettiar* (1917) 40 Mad. 783, 38 I. C. 783.

(w) *Ex parte Snowden* (1881) 17 Ch. D. 44.

(w1) *Re Macoun* (1904) 2 K.B. 700.

(w2) *Gur Narain v. Sheo Lal Singh* (1919) 46 I.A. 1, 46 Cal. 556, 49 I.C. 1; *Vaitheswara v. Srinivasa* (1919) 42 Mad. 348, 50 I.C. 309.

(w3) See *Kelokey Chaman v. Sreemuttu Sarat* (1916) 20 C. W. N. 995, 37 I.C. 71.

(x) *Ex parte Hayward* (1870) L. R. 6 Ch. App. 546; *Ex parte Sadler* (1878) 39 L. T. 361.

(y) *Ex parte Hammond* (1873) L. R. 16 Eq. 614; *Re Stables* (1894) 1 Mans. 68.

(z) *Re King and Beesley* (1895) 1 Q.B. 189.

(a) *Venkatarama Aiyar v. Buran Sheriff* (1926) 50 Mad. 396, 99 I. C. 536, ('27) A. M. 153.

(b) *Ex parte Sadler* (1878) 48 L. J. (Bank.), 43.

(c) *Ananta Kumar v. Sadhu Charan* ('26) A. C. 234, 87 I. C. 751; *Ex parte Ragavaloo Chetti* (1892) 15 Mad. 356.

(d) P.-t. I. A., s. 95.

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provided the time be certain. A trader who takes a bill for the price of goods may petition, if the debtor commits an act of insolvency, although the bill has not matured. The act of insolvency terminates the period of credit given by the bill and the price becomes a debt payable immediately. The fact that the bill has not matured does not, in the event of an act of insolvency supervening, prevent the price from being a debt payable immediately (e).

A liability to pay damages is not a liquidated sum, and cannot be the foundation of a petition until the amount payable is definitely fixed in legal proceedings or by agreement of the parties (f). If interest has been contracted for, it may be added to the principal to make up the requisite amount, but not when it can only be recovered as damages (g).

152. What debt insufficient.—A debt barred by the law of limitation is not a good petitioning creditor's debt (h), nor is a debt founded on an illegal consideration (i). Such debts cannot support an adjudication.

153. Joint debt.—The liability of joint debtors to be adjudged insolvent has already been discussed in paragraphs 89 and 91 above.

154. Act of insolvency must be within three months of petition.—A creditor's petition must allege the specific act of insolvency on which it is founded (para. 158). The act of insolvency on which the petition is founded must have occurred within three months before the presentation of the petition. "Month" means calendar month (j). Under the Bankruptcy Act, 1849, an act of bankruptcy was available for twelve months. The Bankruptcy Act, 1869, reduced the period to six months. The Bankruptcy Act, 1883, further reduced the period to three months. The Indian Acts follow the Bankruptcy Act of 1883 in this respect. In computing the three months the day on which the petition is "presented" is to be excluded (k). A petition is "presented" when it is received and put on the file of the Court (l). A petition may be presented on the same day as that on which an act of insolvency is committed (m). Where a petition is presented by a creditor within three months of an alleged act of insolvency, but is returned as not having been accompanied by a deposit required by Rules made under the Acts, and the petition is re-presented three months after the date of the act of insolvency together with the deposit, the petition will be deemed to have been properly presented. Where a deposit is required by the Rules of the Court, the correct procedure is to accept the petition and require the petitioner to make the deposit within a specified time (n).

An act of insolvency ceases to be available for any purpose *qua* an act of insolvency at the expiration of three months after it has been committed (o). See para. 138 (8) above.

(e) *Re Raatz* (1897) 2 Q.B. 80; *Re Baar* (1896) 1 Q. B. 616.

(f) *Re Miller* (1901) 1 Q. B. 51.

(g) *Ex parte Furber* (1881) 17 Ch.D. 191.

(h) *Ex parte Tynte* (1880) 15 Ch. D. 125.

(i) *See Wells v. Girling* (1819) 1 B. & B. 447.

(j) General Clauses Act, 1897, s. 3 (33).

(k) *Re Hanson* (1887) 4 Morr. 98.

(l) *Re Cripps* (1888) 5 Morr. 226, 229.

(m) *Re Haynes* (1890) 7 Morr. 50.

(n) *Chhotubhai v. Dajibhai* (1924) 26 Bom. L. R. 432, 80 I.C. 482, ('24) A.B. 472, a case under the Prov. I. A., 1920. See Bombay Provincial Rule XXVII (4).

(o) *Allen v. Bonnett* (1870) L. R. 5 Ch. App. 577; *Ex parte Games* (1879) 12 Ch. D. 314. See also *Re Beeston* (1899) 1 Q. B. 626; *Re Harvey* (1890) 7 Morr. 138.

155. Secured creditor's petition.—If the petitioning creditor is a secured creditor, he must in his petition state that he is willing to give up his security for the benefit of his fellow creditors in the events of the debtor being adjudged insolvent, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor. The reason of the rule is that a petitioning creditor in insolvency must be an *unsecured* creditor, that is to say, he must be a creditor who either never had a security, or, if he had one, has given it up or valued it, asserting it to be less in value than the debt, and who presents his petition as being well founded on the balance of the debt after setting off the value of the security, and that balance must amount to Rs. 500 (p).

A secured creditor, who omits in his petition *either* to state that he is willing to give up his security *or* to give an estimate of its value, does not thereby forfeit the benefit of his security; the only result is that an adjudication made on such a petition would be bad (q). An omission through inadvertence *to mention* a security which is of little or no value has been held *not* to be fatal, and the petition can be amended even after the order of adjudication is made (r). The omission of a statement in the petition that the creditor is *willing to give up his security* has been held to be merely a formal defect, and the petition may be amended at the hearing (s).

If the estimate is a real one and not a mere sham, the Court will not on the hearing of the petition go into the question of its correctness. But when the creditor comes to prove for dividend, he will be bound by the estimate in the absence of mistake (t). If he does not prove, the Official Assignee or Receiver cannot compel him to hand over the security on payment of the estimated value (u).

156. Limitation.—Sec. 14 of the Indian Limitation Act, 1908, does not apply to proceedings in insolvency. Hence if a petition is filed in a wrong Court and it is rejected by that Court, and it is subsequently presented to a right Court, the period of three months is to be calculated not from the date of presentation of the petition to the wrong Court, but from the date of presentation to the right Court (v).

(p) *Moor v. Anglo-Italian Bank* (1879) 10 Ch. D. 681, 689.

(q) *Moor v. Anglo-Italian Bank*, *supra*; *Bank of Upper India v. Administrator-General of Bengal* (1918) 45 Cal. 653, 663-664, 47 I. C. 529.

(r) *Re A Debtor* (1922) 2 K.B. 109. See P.-t. I. A., s. 118. There is no such section in the Prov. I. A.

(s) *Ex parte Vandelinden* (1882) 20

Ch. D. 289.

(t) *Re Button* (1905) 1 K. B. 602; *Ex parte Taylor* (1884) 13 Q.B.D. 128; *M. E. Moola and Moola & Sons, Ltd. v. Chartered Bank of India* (1927) 5 Rang. 685, 107 I. C. 860, ('28) A. R. 36.

(u) *Re Vautin* (1899) 2 Q.B. 549.

(v) *Trasi Deva Rao v. Parameshwera* (1914) 39 Mad. 74, 27 I. C. 144.

2.—*Contents, verification, etc., of creditor's petition.*

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157-160

157. Contents and verification of creditor's petition [s. 13 (1)].—A creditor's petition must state the facts which entitle him to present the petition (sec. 12) and the facts which give the Court jurisdiction to entertain it (sec. 11). The petition must be verified by an affidavit of the creditor or of some person on his behalf having knowledge of the facts.

158. Amendment of petition.—An insolvency petition which alleges as an act of insolvency that a debtor has departed from his dwelling-house or otherwise absented himself, but omits to allege that he did so with intent to defeat or delay his creditors, may be amended provided such amendment is made before adjudication, and no injustice is thereby caused to the debtor by reason of the amended petition being directed to be re-served (*w*); but the amendment cannot be made after adjudication (*x*).

A creditor's petition must allege the specific act of insolvency on which it is founded and the facts which constitute the act. It is not sufficient to make vague allegations in the petition, and then endeavour by means of evidence to prove that some hitherto unspecified act of insolvency has been committed (*y*). A debtor cannot be adjudged insolvent on an act of insolvency not alleged in a creditor's petition (*x1*). Where, however, an act of insolvency alleged in a petition is based on a wrong clause of sec. 9 of the Presidency-towns Insolvency Act or a wrong clause of sec. 6 of the Provincial Insolvency Act, *e.g.*, cl. (a), the petition may be allowed to be amended if another act of insolvency can be alleged on the facts contained in it, *e.g.*, cl. (b) or cl. (c) (*z*).

Where a petition is presented by several creditors, but the aggregate debts do not amount to Rs. 500, some of the alleged debts having no existence at all, the petition cannot be amended after three months from the date of the commission of the act of insolvency by adding a fresh petitioner or a fresh debt (*a*).

3.—*Procedure at hearing of creditor's petition (s. 13).*

159. Facts to be proved at the hearing (s. 13).—At the hearing the creditor must prove (1) that he has a good petitioning creditor's debt, and (2) that an act of insolvency has been committed within the time specified in sec. 12 (1) (c). See paras. 149 to 154 above.

160. Debtor as a witness.—Formerly it was the practice not to allow a petitioning creditor to call the debtor in support of an adverse petition for adjudication against the debtor. The reason of the rule was that proceedings in bankruptcy were considered as of a quasi-criminal nature and a criminal cannot be called as a witness to prove a case against himself (*b*). The nature of bankruptcy proceedings was considerably altered

(w) <i>Re Fiddan Squire & Co.</i> (1892) 66 L. T. 203.	28 Bom. L.R. 680, 98 I. C. 437, ('26) A.B. 383.
(x) <i>Ex parte Coates</i> (1877) 5 Ch. D. 979.	(z) <i>Re Phillips</i> (1900) 2 Q. B. 329, 331.
(x1) <i>Kondappa v. Pulappa</i> (1929) 119 I.C. 46, ('29) A.M. 910.	(a) <i>Re Maund</i> (1895) 1 Q.B. 194. See P.-t. I. A., s. 90 (4).
(y) <i>Vasnanji v. Mulji</i> (1926) 50 Bom. 624, 96 I. C. 435, ('26) A.B. 405; <i>Muthu Chettiar v. Nagindas</i> (1926)	(b) <i>Ex parte Castrique</i> (1864) 10 L. T. (N.S.) 757; <i>Re Holloway</i> (1853) 1 Bank. and Ins. Rep. 244.

by the Bankruptcy Act, 1869, and now that a debtor can petition for an adjudication of insolvency against himself, which he could not do before that Act, bankruptcy proceedings are no longer considered as of a quasi-criminal nature. The creditor is therefore entitled to call the debtor himself as a witness in support of his petition. He is also entitled to production of the debtor's books for the purpose of proving the allegations in the petition (c), but an order for discovery or for interrogatories will not be made for that purpose (d).

161. Inquiry into consideration for debt: power to go behind judgment:—The petitioning creditor's debt must be a real debt, that is, a debt for a consideration. The Insolvency Court therefore has power to go behind a judgment and inquire into the consideration even for a judgment debt, and this although the judgment may have gone by default (e), or by consent (f), and though the judgment may have been affirmed on appeal (g). The debtor himself may be estopped from denying the debt, but there is no estoppel as against an Insolvency Court. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's estate among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained against him by his friends or relatives without any debt being due to them at all; it is therefore necessary that the consideration of the judgment debt should be liable to investigation (h). The Insolvency Court will not, as a matter of course, inquire into the validity of a judgment debt. It will do so only where there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice (i). The fact that the judgment is irregular or wrong in form is not sufficient ground for going behind it (j). The inquiry may be made not only at the instance of the Official Assignee or Receiver, but also at the instance of the debtor (k). The object of the inquiry is to ascertain whether there is a good petitioning creditor's debt. If the Court finds that there was no consideration for the judgment debt, all that the Court can do is to dismiss the creditor's petition. It has no power to set aside the judgment of the civil Court; the judgment is *res judicata* as between the debtor and the creditor (l).

162. Service of petition.—The Act does not provide for the service of petition on the debtor except where the hearing is adjourned [s. 13 (3)]. If the hearing is adjourned and service of the petition is ordered, service must be proved. If it is not proved, the petition must be dismissed (m).

(c) *Re X. Y.* (1902) 1 K. B. 98.

(d) *Re A Debtor* (1910) 2 K. B. 59.

(e) *Ex parte Kibble* (1875) L. R. 10 Ch. App. 373. See also *Ram Lal Tandon v. Kashi Charan* (1928) 26 All. L. J. 241, 108 I. C. 147.

(f) *Ex parte Lennox* (1886) 16 Q. B. D. 315. See also *Re Hawkins* (1895) 1 Q. B. 404.

(g) *Re Frazer* (1892) 2 Q. B. 633.

(h) *Ex parte Kibble* (1875) L. R. 10 Ch. App. 373, at pp. 376-377.

(i) *Re Flatau* (1889) 22 Q. B. D. 83.

(j) *Re Beauchamp* (1904) 1 K. B. 572, (1904) 11 Mans. 5.

(k) *Ex parte Lennox* (1886) 16 Q. B. D. 315.

(l) *Re Victoria* (1894) 2 Q. B. 387.

(m) *Nathmull v. Goneshmull* (1921) 34 Cal. L.J. 349, 66 I. C. 886, ('21) A. C. 106.

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163. Adjourning hearing of petition.—The Court has power to adjourn the hearing of the petition and order service thereof on the debtor. See para. 162 above.

164. Dismissal of petition.—If the creditor fails to give the necessary proof of the facts specified in para. 159 above, the petition will be dismissed. Even if these facts are proved and the necessary conditions are complied with, the Court must dismiss the petition if the debtor appears and satisfies the Court that he is able to pay his debts, or that he has not committed an act of insolvency, or that for *other sufficient cause* no order ought to be made.

165. Petition may be dismissed for sufficient cause.—What is sufficient cause will depend on the facts of each case. It is not a sufficient cause for refusing an order of adjudication that the debtor has no assets available for distribution, for at the time of the hearing the Court will not have sufficient materials for judging whether there are assets or not, and the public examination of the insolvent at a later stage may disclose some assets (n), or the debtor may get some property before his discharge (o). As stated by Erle, C.J., in *Morgan v. Knight* (p) "property is not an essential for constituting bankruptcy. If there is thedebt, and act, the bankruptcy is valid without any property." If, however, the Court is satisfied, not merely by the statement of the debtor, but from all the circumstances of the case, that there cannot be any assets or any prospect of any coming into existence, and that if an order of adjudication is made, the only effect will be a mere waste of money in costs, it will dismiss the petition (q). Where the debtor has only one asset, and the effect of adjudication would be to destroy this asset, the Court may dismiss the petition. Thus where the only asset to which a debtor was entitled was a life interest in the income of certain property, which was determinable on bankruptcy, and the debtor proposed to insure his life and to set aside half his income for the purpose of keeping up the insurance and paying his creditors a composition of ten shillings in the pound, it was held that the fact that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors was a sufficient cause why no receiving order should be made (r). It is not a sufficient cause that the costs of insolvency proceedings will probably exhaust the assets (s). Nor is it a sufficient cause that the debtor has, with the assent of a large majority of his creditors, executed a deed transferring the whole of his property to trustees appointed by the creditors to be administered by them as in insolvency, if the petitioning creditor has not assented to the deed; the execution of such a

(n) *Re Leonard* (1896) 1 Q. B. 473.

947.

(o) *Re Muriella* (1896) 3 Mans. 35.

(q) *Re Betts* (1897) 1 Q. B. 50.

(p) (1864) 33 L. J. C. P. 168, 169, (1864)

(r) *Re Otway* (1895) 1 Q. B. 812.

15 C. B. (N. S.) 669, 143 E. R.

(s) *Re Jubb* (1897) 1 Q. B. 641.

deed is in itself an act of insolvency (t). The fact that payments have been made by the debtor to the petitioning creditor between the filing of the creditor's petition and the date of the hearing is not a sufficient ground for dismissing the creditor's petition (u).

**Paras.
165-166**

165A. Creditor's petition against undischarged insolvent for second adjudication.—An undischarged insolvent who after the date of his insolvency has resumed business and contracted fresh debts may be adjudicated insolvent a second time on a creditor's petition (v). If however, there are no assets available for distribution under the second insolvency, and there is no probability of there being any, the Court will in the exercise of its discretion refuse to make a second order of adjudication (w). As to second petition by an undischarged insolvent, see para. 181A below.

166. Abuse of bankruptcy laws.—If the presentation of the petition is an abuse of the process of the Court, it should be dismissed. Thus where a creditor's petition is dismissed, and the same creditor presents a second petition founded on the same debt and the same act of bankruptcy, only adding another creditor as a co-petitioner, the second petition was dismissed as vexatious and an abuse of the process of the Court (x).

The Court will not permit bankruptcy proceedings to be used for an inequitable purpose, *e.g.*, to extort money from the debtor. If money has been extorted or attempts are made to extort or to get an undue advantage secretly over the other creditors, it is a "sufficient cause" for dismissing the petition. Thus where a creditor obtains or endeavours to obtain payment of money from the debtor as a condition for agreeing to an adjournment of the petition, the petition will be dismissed (y). Similarly if a creditor refuses to assent to a deed of assignment of all the debtor's property for the benefit of his creditors unless the debtor gives a promissory note for the difference between the amount to be paid under the deed and the amount of his debt, and the debtor refuses to do so, and the creditor afterwards presents a petition founded on the act of insolvency constituted by the execution of the deed, the petition will be dismissed (z). It is otherwise if the creditor openly at the meeting of creditors tries to obtain terms. Thus where a creditor, from whom the debtor had had delivery of goods on credit when he was hopelessly

(t) *Ex parte Dixon* (1884) 13 Q. B. D. 118; *Ex parte Oram* (1885) 15 Q. B. D. 399.

(u) *Tara Chand v. Jugul Kishore* (1924) 46 All. 713, 83 I. C. 967, ('24) A. A. 686.

(v) *Morgan v. Knight* (1864) 33 L. J. C. P. 168, (1864) 15 C. B. (N. S.) 669, 143 E. R. 947; *Ex parte Watson* (1879) 12 Ch. D. 380.

(w) *Re Betts* (1897) 1 Q. B. 50.

(x) *Re Larard* (1896) 3 Mans. 317. See also *Ex parte Harsukdas Balkisendas* (1924) 39 Cal. L. J. 512, 83 I. C. 941, ('24) A. C. 964.

(y) *Re Atkinson* (1892) 9 Morr. 193; *Re Otway* (1895) 1 Q. B. 812.

(z) *Re Shaw* (1901) 83 L. T. 754; *Re A Debtor* (1905) 91 L. T. 664, affirmed *sub nomine Re Goldberg* (1905) 21 T. L. R. 139.

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insolvent, attended a meeting of the creditors, and refused to assent to an assignment of the debtor's property for the benefit of his creditors unless the goods were returned to him or their value allowed, it was held that there was neither fraud nor extortion, either accomplished or intended, and consequently there was not sufficient cause for dismissing a petition founded on an act of bankruptcy constituted by the execution of the deed (a). Where a creditor consents to his petition being dismissed upon the terms of the debtor agreeing to pay a fresh debt of an increased amount, it is not an abuse of the process of the Court for the creditor, in case of the debtor making default, to present a second petition based upon the new debt, provided he has not used extortion or pressure towards the debtor (b). Nor is it an abuse of the process of the Court if a creditor, whose debt is insufficient to support a petition, buys up another debt in order to present a petition against the debtor, provided that there has been no pressure and no attempt to extort money (c).

The mere fact that the petitioning creditor is actuated by a motive other than the mere desire to obtain a distribution of the debtor's estate in insolvency, *e.g.*, by a wish to put an end to a partnership with the debtor, does not constitute an abuse of the process of the Court nor is it a fraud upon the Court. Motive cannot in itself constitute fraud. Courts of justice have no concern with the motives of parties who have asserted a legal right (d).

167. Where insolvency proceedings are pending in another Court.—The fact that the same debtor has been adjudged insolvent by Court *A* does not oust the jurisdiction of Court *B* to adjudicate him an insolvent if the elements necessary to give Court *B* jurisdiction exist in the case. Court *B*, however, is not bound to make an order of adjudication, but has a discretion to refuse it. If having regard to all the circumstances of the case it considers an adjudication entirely useless, it may refuse to make the order. If, however, there are assets within the jurisdiction of Court *B*, the Court will as a general rule make an order of adjudication, leaving for future determination the question in which Court the assets ought ultimately to be administered. The presence of assets within the jurisdiction is a strong circumstance in favour of making such an order (e). The same rules apply where the prior order of adjudication has been made by an English Bankruptcy Court or by a Court of a foreign country (f).

As to the discretionary power of the Court, it is to be observed that while a Court under the Presidency-towns Insolvency Act has always a discretion in making an order of adjudication (g), it is not so under the Provincial Insolvency Act. Under the latter Act, so far as a creditor's

(a) *Re Sunderland* (1911) 2 K. B. 658.

(b) *Re Bebro* (1900) 2 Q. B. 316.

(c) *Re Baker* (1888) 5 Morr. 5.

(d) *King v. Henderson* (1898) A.C. 720.

(e) *Sastikinkar Banerjee v. Hursookdas Chogemull* (1927) 31 C.W.N. 1002, 104 I. C. 1, ('27) A. P.C. 162 [P.-t. I. A.]; *Re Aravayal Sabhapathy* (1897) 21 Bom. 297 [Ind.

Ins. Act, 1848]; *In the matter of William Watson* (1904) 31 Cal. 761 [Ind. Ins. Act, 1848]. See also P.-t. I. A., s. 22; Prov. I. A., s. 36.

(f) *In the matter of William Watson* (1904) 31 Cal. 761 [Ind. Ins. Act, 1848]; *Re A Debtor* (1929) 1 Ch. 362.

(g) See P.-t. I. A., ss. 13 and 15.

petition is concerned, the Court has the power to dismiss it for a "sufficient cause" (h), and it may well be said that where there are no assets within the jurisdiction it is a "sufficient cause" for dismissing the petition. As regards a debtor's petition, the Court has no choice in the matter. A debtor's petition can only be dismissed if the Court is not satisfied of his right to present the petition; if it is not dismissed, the Court "shall" make an order of adjudication (i). I do not think any such difference was contemplated by the legislature.

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168. Dismissal of petition after discharge.—A petition cannot be dismissed after discharge (j).

169. Order of adjudication.—The Court may make an order of adjudication if it is satisfied with the proof of the facts which are required to be proved at the hearing (para. 159 above), or if on a hearing adjourned for the purpose of serving the petition on the debtor, the debtor does not appear and service of the petition on him is proved, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

170. Stay of proceedings to ascertain amount of debt.—Where the debtor at the hearing denies that he is indebted to the petitioner or that the amount of the debt is sufficient, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against the debtor in due course of law, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt. If upon the trial of that question the debtor admits the debt and pays the amount of the debt and costs into Court, the petitioning creditor is not bound to accept payment of the debt by taking the money out of Court, but may proceed with the petition and obtain an order of adjudication. A creditor cannot be required *after* presentation of a petition to accept payment of a debt when he is not willing to receive it (k).

Security will not be required where the probability of success is as much in favour of the debtor as of the creditor and there is a *bona fide* dispute as to the debt (l). But it is otherwise if the debtor has no reasonable prospect of establishing his defence (m).

Stay of proceedings on the petition of one creditor should not be allowed to prejudice other creditors. It has accordingly been provided that where proceedings on the petition of one creditor are stayed, the Court may,

(h) See Prov. I. A., s. 25 (1).

(i) See Prov. I. A., s. 26 (2) and s. 27 (1).

(j) *In the matter of the Petition of Ramsabak Misser* (1870) 6 Beng. L. R. 310.

(k) *Re Gentry* (1910) 1 K. B. 825.

(l) See *Ex parte Turner* (1874) L. R. 10 Ch. App. 175.

(m) See *Ex parte Ward* (1882) 20 Ch. D. 356; *Ex parte Jacobson* (1883) 22 Ch. D. 312.

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if by reason of the delay caused by stay of proceedings or for any other cause it thinks just, make an order of adjudication on the petition of some other creditor. In the latter case the Court must dismiss, on such terms as it thinks just, the petition on which proceedings have been stayed. Where an order of adjudication is made on one petition, all other petitions should be dismissed.

170A. When order of adjudication takes effect.—An order of adjudication is made on the day it is pronounced, and not on the day it is drawn up (*n*).

(*n*) *Re Manning* (1895) 30 Ch. D. 480; *Blount v. Whitley* (1899) 6 Mans. 48, (1899) 79 L. T. 635.

1. Conditions on which debtor may petition.

P.-t. I. A., s. 14.

171. Conditions on which debtor may petition (s. 14).—A debtor is not entitled to present an insolvency petition unless—

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- (a) his debts amount to Rs. 500 ; or
- (b) he has been arrested and imprisoned in execution of a decree for the payment of money ; or
- (c) an order of attachment in execution of a decree for the payment of money has been made and is subsisting against his property.

A debtor is entitled to present an insolvency petition if any one of the three conditions mentioned above is complied with. If none of these conditions is fulfilled, the petition must be dismissed.

172. Debts must amount to Rs. 500.—Where several debtors are jointly and severally liable on a bond for Rs. 500 or upward, each is entitled to present an insolvency petition (o).

“Debt” includes money payable under a decree (p). Money due under a decree of a Revenue Court is a “debt” (q), though it may not be a provable debt (r). The fact that a suit is commenced to enforce a bond is not a bar to a petition for adjudication based on that debt, provided the debt is proved in the Insolvency Court (s).

173. Imprisonment of debtor.—The imprisonment must be subsisting at the time of the presentation of the petition (t). Further, it must be in execution of a decree for the payment of money.

174. Attachment of debtor's property.—The attachment must be in execution of a decree for the payment of money, and it must be subsisting at the time of the presentation of the petition (u). An attachment before judgment is not an attachment in execution of a decree and will not support a petition (v). It need hardly be stated that the attachment must be of the debtor's own property (w).

175. Petition by debtor whose adjudication has been annulled for failure to apply for discharge.—[s. 14 (2)] A debtor in respect of whom an order of adjudication whether made under the Presidency-towns Insolvency Act or the Provincial Insolvency Act has been annulled owing to his failure to apply or to prosecute an application for his discharge is not entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court should not grant leave unless it is satisfied either that the debtor was prevented by some reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.

- (o) *Ghulam Haider v. Mangal Sen* ('26) A. L. 235, 98 I. C. 425; *Ghulam Husain v. Rameshwar* ('27) A. L. 108, 99 I. C. 524.
- (p) *P.-t. I. A., s. 2 (b)*. See also *Ghulam Haider v. Mangal*, ('26) A. L. 235, 98 I. C. 425, a case under the Prov. I. A.
- (q) *Munna Singh v. Dighijai Singh* (1921) 19 All. L. J. 273, 60 I. C. 758, ('21) A. A. 74.
- (r) *Parbati v. Raja Shyam Rikh* (1922) 44

- All. 296, 66 I. C. 214, ('22) A. A. 74.
- (s) *Ananta Kumar v. Sadhu Charan*, ('26) A. C. 234, 87 I. C. 751.
- (t) *Junai v. Muhammad Kazim Ali* (1903) 25 All. 204.
- (u) See *Junai v. Muhammad Kazim Ali* (1903) 25 All. 204, 206.
- (v) *Makhan Lal v. Gulzari Mal* (1884) 6 All. 289.
- (w) *Harish Chandra Mukherjee v. The East India Coal Co., Ltd.* (1912) 16 C. W. N. 733, 14 I. C. 576.

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The above clause [which is sub-sec. (2) of sec. 14] is new. It was inserted by Act XI of 1927. It is in almost the same terms as sec. 10 (2) of the Provincial Insolvency Act, 1920. It provides for cases where an adjudication has been annulled under sec. 41 of the Presidency-towns Insolvency Act or under sec. 43 of the Provincial Insolvency Act owing to the debtor's failure to apply for his discharge. There was no such provision in the Provincial Insolvency Act, 1907. In the absence of any such provision in the Act of 1907 a dishonest insolvent hardly ever applied for his discharge, for, if he did so, he ran the risk of his malpractices being exposed and dealt with by the Court, and if his adjudication was annulled owing to his failure to apply for his discharge within the specified time (*x*), he came forward with another petition for adjudication and applied for a protection order and again obtained immunity from arrest. In most cases the second petition was founded on the same facts and was in respect of the same debts and the same creditors as the previous petition. In two such cases, which were both under the Presidency-towns Insolvency Act, the High Court of Calcutta held that the presentation of the second petition was an abuse of the process of the Court and that the Court had inherent power in such a case to annul the order of adjudication made upon the second petition (*y*). Successive petitions for adjudication without any application for a discharge were not uncommon; and it was to prevent this abuse that the legislature introduced in the Provincial Insolvency Act, 1920, the wholesome rule that a debtor in respect of whom an order of adjudication has been annulled owing to his failure to apply or to prosecute his application for his discharge is not entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. A similar provision was introduced seven years later in the Presidency-towns Insolvency Act by Act XI of 1927. By the same Act power was given to Insolvency Courts both under the Presidency-towns Insolvency Act and Provincial Insolvency Act to annul an order of adjudication made upon a petition presented without the leave of the Court (*z*).

When an adjudication has been annulled owing to the insolvent's failure to apply or to prosecute an application for his discharge, leave to present another petition on the *same* facts will not be granted unless the Court is satisfied that the insolvent was prevented by some reasonable cause from presenting or prosecuting his application (*a*).

2. Contents of petition and order of adjudication.

176. Contents of debtor's petition [s. 15 (1)].—A debtor's petition must allege that he is unable to pay his debts (*b*). If an order of adjudication is made on the allegation that the debtor is unable to pay his debts, and the allegation turns out to be false, the adjudication must be annulled under sec. 21 of the Act (*c*).

(*x*) P.-t. I. A., s. 41; Prov. I. A., s. 43.

(*y*) See *Malchand v. Gopal Chandra* (1917) 44 Cal. 899, 39 I. C. 199; *Re Ballav Chand. Serowjee* (1922) 27 C. W. N. 739, 80 I. C. 651, ('23) A. C. 703.

(*z*) See P.-t. I. A., s. 21, and Prov. I. A., s. 38, as amended by Act XI of 1927.

(*a*) See *Venugopalacharia v. Chunilal*

(1926) 49 Mad. 935, 97 I. C. 706, ('26) A. M. 942; *Beli Ram v. Mangal Das* ('28) A. L. 452 [where leave was granted].

(*b*) See Bombay Rules—App. 1, Form No. 2; Calcutta Rules—App. 111, Form No. 7.

(*c*) *Alamelumangathayarammal v. Balusami* (1928) 108 I. C. 208, ('28) A. M. 394.

177. Dismissal of debtor's petition [s. 15 (3)].—A debtor's petition must be dismissed if he fails to satisfy the Court that he is entitled to present the petition (*d*). It must also be dismissed, as now provided by Act XIX of 1927, if, on the making of the order admitting his petition, he fails to produce his books of account (unless the Court otherwise directs), or to file such lists of creditors and debtors and afford such assistance to the Court as may be prescribed by the rules.

178. Order of adjudication [s. 15 (1)].—If the debtor proves that he is entitled to present the petition (*e*), the Court may make an order of adjudication, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

179. Advertisement of order of adjudication (s. 20).—Notice of every order of adjudication, stating the name, address and description of the insolvent, the date of the adjudication, the Court by which the adjudication is made and the date of presentation of the petition, shall be published in the Gazette of India and in the local official Gazette and in such other manner as may be prescribed. The Court has power under sec. 94 of the Act to make an order staying advertisements and all proceedings under an order of adjudication (*f*).

180. Gazette to be evidence of order of adjudication (s. 116).—A copy of the official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date.

Under the English law the production of a copy of the London Gazette containing any notice of an order adjudging a debtor bankrupt is conclusive evidence in all legal proceedings of the order having been duly made, and of its date. It has accordingly been held that an adjudication is, so long as it stands, conclusive evidence as against a third person that the act of bankruptcy on which the adjudication was founded was in fact committed and that the title of the trustee relates back to that act of bankruptcy. The order, however, may be appealed from by any party aggrieved by it (*g*). In India also a copy of the official gazette containing any notice of an order of adjudication is conclusive evidence of the order having been duly made, and of its date. It has, however, been held that the only effect of an order of adjudication is that the act of insolvency on which the order is founded should be regarded as such, but that it does not operate as a decision against a third person who has not had any opportunity of being heard when the order was made. Thus if the act of insolvency on which an order of adjudication is founded is a payment by way of fraudulent preference by the debtor to a creditor, the Official Assignee is not entitled to payment back from the creditor on the strength merely of the decision, given when the order of adjudication was made, that the debtor had made a payment by way of fraudulent preference. The decision was for the sole purpose of making the order of adjudication, and it is not binding on the creditor. The Official Assignee can recover back the amount from the creditor only by adopting

(*d*) P.-t. I. A., s. 14.

(*e*) P.-t. I. A., s. 14.

(*f*) *Re A Debtor* (1901) 84 L.T. 66.

(*g*) *Ex parte Learoyd* (1878) 10 Ch.D.

3; *Hawkins v. Duche* (1921) 37 T.L.R. 748, 750. See B.A., 1869, s. 10; B.A., 1914, s. 137.

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the ordinary procedure, namely, by way of notice of motion to set aside the transaction under sec. 56 of the Act (h).

181. Refusal to adjudicate on debtor's petition on ground of abuse of process of Court.—The Bankruptcy Court in England has inherent power to refuse an order of adjudication in cases where the presentation of the debtor's petition is an abuse of the process of the Court. Thus where a debtor was undischarged under three previous bankruptcies, in two of which he had himself petitioned with the view of evading committal orders, and he presented another bankruptcy petition and a receiving order was made on it, it was held that the presentation of the petition was an abuse of the process of the Court, and that the receiving order founded upon it must be dismissed (i). Following the English decisions the High Court of Calcutta held in two cases, both under the Presidency-towns Insolvency Act, that where an insolvent, in respect of whom an order of adjudication has been annulled owing to his failure to apply for his discharge, presents another petition for adjudication on the same facts, and an order of adjudication is made upon such petition, the presentation of the second petition is an abuse of the process of the Court, and the adjudication should be annulled (j). The first of these cases was before the Privy Council ruling in *Chhatrapat Singh Dugar v. Kharog Singh Lachmiram* (k), and the second, *Re Ballav Chand Serowgee* (l), was after it. In *Chhatrapat Singh Dugar's case*, which was one under the Provincial Insolvency Act, 1907, the High Court of Calcutta had refused an order of adjudication on a debtor's petition on the ground that there was misconduct on the part of the debtor in relation to his creditors and that the presentation of the petition was an abuse of the process of the Court. This decision was reversed by the Privy Council, and it was held that once the conditions laid down in the Provincial Insolvency Act were complied with, the Court had no power to dismiss a debtor's petition on the ground that the presentation of the petition was an abuse of the process of the Court. It was further held that misconduct on the part of the debtor was to be dealt with upon the debtor's application for his discharge, and that it was not a ground upon which an order of adjudication could be refused. In *Ballav Chand Serowgee's case*, which was subsequent to the Privy Council ruling referred to above, the High Court of Calcutta maintained that it had inherent power to refuse an order of adjudication if the presentation of the petition was an abuse of the process of the Court. As to the Privy Council ruling the High Court said that the facts of that case were quite different from the case before it.

As stated above, the case before the Privy Council was one under the Provincial Insolvency Act, 1907. It is provided by that Act that in the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied that he is entitled to present the petition (m), and if the

(h) *Official Assignee of Madras v. O.R.M.O.R.S. Firm* (1927) 50 Mad. 541, 101 I.C. 12, ('27) A.M. 526.

(i) *Re Betts* (1901) 2 K.B. 39; *Re Painter* (1895) 1 Q.B. 85; *Re Hancock* (1904) 1 K.B. 585; *Re Bond* (1888) 21 Q.B.D. 17.

(j) *Malchand v. Gopal Chandra Ghosal* (1917) 44 Cal. 899, 39 I.C. 199;

Re Ballav Chand Serowgee (1922) 27 C. W. N. 739, 80 I.C. 651, ('23) A.C. 703.

(k) (1916) 44 Cal. 535, 44 I. A. 11, 39 I. C. 788.

(l) (1922) 27 C. W. N. 739, 80 I.C. 651, ('23) A.C. 703.

(m) Prov. I. A., 1907, s. 15 (1); Prov. I. A., 1920, s. 25 (2).

petition is not dismissed, the Court *shall* make an order of adjudication (u). The language of sec. 15 of the Presidency-towns Insolvency Act is different. That section says that "if the debtor proves that he is entitled to present a petition, the Court *may* make an order of adjudication." The word used being "may," and not "shall" as in the Provincial Insolvency Act, it is submitted that the Court has discretion under the Presidency-towns Insolvency Act to refuse to make an order of adjudication even if the conditions which entitle the debtor to present a petition are complied with, and the Calcutta decisions may be supported on this ground. If the Calcutta cases had arisen under the Provincial Insolvency Act, 1920, the second petition could not have been presented except with the leave of the Court which annulled the first adjudication (o). Even so, there was a defect in that Act, for it did not contain any provision for the annulment of the second adjudication if such adjudication was made on a petition presented without the leave of the Court. This defect was remedied in 1927 (p) by the amendment of sec. 35 of that Act. At the same time the Presidency-towns Insolvency Act was brought into line with the Provincial Insolvency Act by the amendment of secs. 14 and 21 of that Act. The result is that cases like the Calcutta cases referred to above, where a second petition was made after annulment of the first adjudication, would no longer be disposed of on the ground of the abuse of the process of the Court. They would now be dealt with under sec. 14 (2) of the Presidency-towns Insolvency Act and sec. 10 (2) of the Provincial Act, as the case may be. See paras. 223 and 254 below.

181A. Petition for adjudication by undischarged insolvent.—Sec. 14 (2) of the Presidency-towns Insolvency Act applies in terms to the case where an adjudication *has been annulled* under sec. 41 owing to failure on the part of the insolvent to apply or prosecute an application for his discharge. Where the adjudication *has not been annulled*, the question arises whether the debtor is entitled to present a second petition for his adjudication. There is no doubt that an undischarged insolvent who after the date of his insolvency has resumed business and contracted fresh debts may be adjudicated insolvent a second time on a creditor's petition (see para. 165-A above). Whether an undischarged insolvent can file his own petition pending proceedings in the first insolvency has not been definitely decided (q). It seems that he can unless the presentation of the petition is an abuse of the process of the Court as in *Re Betts* (r) cited in para. 181 above. *Re Betts* was the case of a "professional bankrupt," that is, a bankrupt who was in the habit of incurring debts and filing bankruptcy petitions with the view of evading committal orders. If the presentation of the petition is an abuse of the process of the Court, the petition must be dismissed, and if an order of adjudication is made on it, the adjudication must be annulled.

181B. Insolvency Rules as to petition.—As to Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 66-87, Madras Rules 16-26, Bombay Rules 53-70, Rangoon Rules 12-18, 89-111;

181C. Insolvency Rules as to adjudication.—As to Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 94-102, Madras Rules 63-69, Bombay Rule 85, Rangoon Rules 118-122.

(n) Prov. I. A., 1907, s. 16; Prov. I. A., 1920, s. 27.

(o) Prov. I. A., 1920, s. 10 (2).

(p) The amendment was introduced by Act XI of 1927.

(q) See *Ex parte Sydney* (1875) L.R. 10 Ch. App. 208 a case of second petition in liquidation under B.A., 1869].
(r) (1901) 2 K. B. 39.

III.—RECEIVING ORDER, ETC., UNDER THE ENGLISH LAW.

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182. Receiving order under the English law.—In England a receiving order precedes an adjudication order ; it is made in the same circumstances in which an order of adjudication would be made in India. A receiving order is not equivalent to an adjudication in bankruptcy. It does not divest the debtor of his property, nor does it vest any estate or interest in the receiver. It merely protects the debtor's estate until an adjudication order is made. It constitutes the Official Receiver receiver of the debtor's property and so precludes all valid dealings by the debtor in respect of his property. Though a receiving order does not make the debtor a bankrupt, a creditor cannot, after the making of a receiving order, commence any action or other legal proceeding against the debtor in respect of a debt provable in bankruptcy without the leave of the Bankruptcy Court. An Official Receiver is appointed by the Board of Trade, and is an officer of that department, but at the same time he is an officer of the Court to which he is attached. In India there is no such thing as a receiving order. There is, only one order made and that is an order of adjudication.

183. Adjudication order under the English law.—A receiving order is the first step towards a debtor being adjudicated a bankrupt. An adjudication order is made at a later stage. After a receiving order is made, the Official Receiver has to summon the creditors to a meeting which is called the first meeting of creditors. The debtor may put before the creditors some proposal of a composition in satisfaction of his liabilities or a scheme of arrangement of his affairs as an advantageous alternative to bankruptcy. If the creditors accept the scheme, it has to be approved by the Court. If the creditors at the first meeting resolve by an ordinary resolution that the debtor be adjudged bankrupt, or if they pass no resolution or do not meet, or if no composition or scheme is approved within fourteen days after the conclusion of the public examination of the debtor or such further time as the Court may allow, the Court must make an adjudication order. When an adjudication order is made, the property of the bankrupt vests in a trustee called trustee in bankruptcy, just as in India it vests in the Official Assignee or Receiver. The Official Receiver is to be trustee until a trustee is appointed.

184. Official Receiver under the English law.—The duties of the Official Receiver in England have relation both to the conduct of the debtor and to the administration of his estate. As regards the debtor's conduct it is the duty of the Official Receiver to investigate it and to report to the Court whether the debtor has committed any act which would justify the Court in refusing, suspending or qualifying an order for his discharge. It is also his duty to take such part as may be directed by the Board of Trade in the

public examination of the debtor, and to take such part and give such assistance in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct. As regards the estate of a debtor, it is the duty of the Official Receiver, pending the appointment of a trustee, to act as receiver and manager of it, to summon and preside at the first meeting of creditors, to report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs and to act as trustee during any vacancy in the office of trustee. Every Official Receiver is accountable to the Board of Trade (s). The Board of Trade is a State department and it is entrusted with certain duties in the administration of the estate of bankrupts. It also audits the accounts of Official Receivers and trustees.

185. Trustee in bankruptcy under the English law. The appointment of a trustee of the debtor's estate rests in the first instance with the creditors. If the creditors appoint a trustee, the appointment is not complete until the Board of Trade has certified that it has been duly made. If no trustee is appointed by the creditors within four weeks from the date of the adjudication, the Official Receiver is to report the matter to the Board of Trade, and the Board of Trade will thereupon appoint some fit person to be trustee of the bankrupt's property and will certify the appointment. But this does not preclude the creditors from afterwards appointing a trustee of their own choice and they may at any time appoint a trustee, and on the appointment being certified by the Board of Trade, the trustee so appointed will supersede the trustee appointed by the Board (t). When the appointment of a trustee has been certified he becomes an officer of the Court, and all the property of the bankrupt wherever situate becomes vested in him. The duties of a trustee are to realise the property of the bankrupt and to distribute it amongst his creditors (u).

(s) B.A., 1914, ss. 72, 73 and 74.

(t) B.A., 1914, s. 19.

(u) B.A., 1914, s. 48, *et seq.*

LECTURE V.

PART II.

PETITION AND ORDER OF ADJUDICATION.

Prov. I. A., ss. 7, 9-13, 19, 24, 25, 27.

Paras. 186, 187. 186. Power to adjudicate (s. 7).—This part of the Lecture is confined to insolvency petitions under the Provincial Insolvency Act and the hearing of such petitions. Before dealing with this subject it is necessary to consider the power of Courts exercising insolvency jurisdiction under the Provincial Insolvency Act and the restrictions on their jurisdiction. Subject to the conditions specified in this Act (a), if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order, called an order of adjudication, adjudging him an insolvent. The presentation of a petition by the debtor is deemed an act of insolvency, and on such petition the Court may make an order of adjudication.

The two essential conditions to be fulfilled before an order of adjudication can be made are, first, that there must be a debtor within the meaning of the insolvency law, and, secondly, that there must be an act of insolvency done or suffered by the debtor. An order of adjudication can only be made on a petition. It may be a petition presented by a creditor called the petitioning creditor, or by the debtor. A petition is the first step in insolvency proceedings leading up to adjudication. The acts of insolvency available to a creditor are specified in sec. 6 of the Provincial Insolvency Act. In the case of a debtor's petition, the presentation of the petition is deemed an act of insolvency. The petition must be presented to a Court which has insolvency jurisdiction. There are, however, certain restrictions which are placed upon the jurisdiction of the Court to make an order of adjudication. They are set out in sec. 11 of the Act. We proceed to consider that section.

187. Court to which petition should be presented (s. 11).—Every insolvency petition must be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody: provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice.

(a) See ss. 9 and 10 of the Prov. I. A.

188. Local jurisdiction.—Sec. 11 defines what may be called the local jurisdiction of Provincial Insolvency Courts. The proviso to the section is a reproduction *mutatis mutandis* of sec. 21 of the Code of Civil Procedure, 1908. An insolvency petition under this section can only be presented to a Court having jurisdiction in any local area (a) in which the debtor ordinarily resides, or (b) carries on business, or (c) personally works for gain, or (d) is in custody. If he resides in one place and carries on business in another, a petition may be presented against him in either place or in both, and he may be adjudged insolvent by the Court having jurisdiction in each of those places. So also if he carries on business in two places. The place where the debt is incurred is immaterial if the debtor is subject to the jurisdiction of the Court (b). Nor does it make any difference if the majority of his creditors are outside the jurisdiction of the Court. It is also immaterial where his property is situated; the reason is that “property is not an essential for constituting bankruptcy” (c).

189. “Ordinarily resides.”—The word “residence” is an elastic word, and whether it is used in a particular Act or in a particular section in a narrow or more extended meaning is to be determined according to what the Court believes to have been the intention of the legislature in framing the provision in which the word occurs (d). The word “residence” denotes the place where a person eats, drinks and sleeps; the mere fact, therefore, that a person owns a house in a place does not constitute that house his residence (e).

The residence contemplated by the section need not be permanent or continuous. It may be temporary, but it must be *bona fide*. If a person abandons his last residence and goes to another place with the *bona fide* intention of residing there, he will be deemed to reside in that place within the meaning of section 11. In such a case the duration of his residence is immaterial. A temporary residence, however, at a place with the sole object of taking the benefit of the Act is not residence within the meaning of the section (f). Occasionally staying with a friend or a relation at a certain place does not constitute that place a residence (g). The section

(b) See *Ex parte Pascal* (1876) 1 Ch. D. 509.

(c) *Morgan v. Knight* (1864) 33 L. J. C. P. 168, (1864) 15 C. B. (N. S.) 669, 143 E.R. 947.

(d) *Mahomed Shuffli v. Laldin Abdulla* (1879) 3 Bom. 227, 229; *Shri Goswami v. Shri Goverdhan Lalji* (1890) 14 Bom. 541, 547; *Anilbala v. Dhirendra* (1920) 32 Cal. L. J. 314, 57 I. C. 768.

(e) *R. v. North Curry* (1825) 4 B. & C. 953, 107 E. R. 1313; *Kumud Nath Roy Chowdhury v. Jolindru Nath Chowdhury* (1911) 38 Cal. 394, 9 I. C. 120. *Re Manohi* (1908) 10

Bom. L. R. 84, at pp. 85-86.

(f) *In the matter of F. De Momet* (1894) 21 Cal. 634; *Sheikh Abdul Rezak v. Basiruddin Ahmed* (1911) 17 C. W. N. 405, 14 I. C. 980; *Lakshminarayana Aiyar v. Subramania Aiyar* (1923) 45 M. L. J. 129, 73 I. C. 74, (23) A. M. 585; *In the matter of Tariney Churn Goho* (1873) 11 Beng. L. R., App. 26; *Periya Karuppan Chettiar v. Angappa Chettiar*, (25) A. M. 483, 86 I. C. 229.

(g) *Madho Pershaud v. A. L. Walton* (1913) 18 C. W. N. 1050, 1051, 20 I. C. 370

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says, "ordinarily resides" and not merely "resides" (*h*). A visitor, therefore, to a place, is not "ordinarily resident" in that place (*i*). A debtor may reside at two places, and in that case an insolvency petition may be presented by or against him in both places and he may be adjudged insolvent simultaneously in both places (*j*). See para. 142 above.

190. "Carries on business."—Any occupation for the purpose of making profits is "business" (*k*). A person does not cease to carry on business merely because he undertakes no new business. If the business debts remain unpaid and outstandings have to be recovered, he will be deemed to carry on business within the meaning of section 11 (*l*). The business need not be carried on by the debtor in person; it may be carried on through an agent. When, however, it is a question of "working for gain," the work must be one done by him personally.

191. Custody within jurisdiction.—It is sufficient to give the Court jurisdiction under this section if the debtor is either under arrest or is imprisoned at the time of the presentation of the petition. It is not necessary that he should have been both arrested *and* imprisoned.

Though the attachment of a debtor's property is one of the facts which entitles him to present an insolvency petition (*m*), the mere fact that the property attached is situate within the jurisdiction of the Court to which a petition is presented will not give jurisdiction to that Court to entertain the petition. It is necessary that the debtor should be residing or carrying on business within the jurisdiction or that some one of the other conditions laid down in the present section should be complied with.

191A. Jurisdiction and burden of proof.—The burden lies on the petitioner to show that the Court to which the petition is presented has jurisdiction to entertain it (*n*).

192. Where petition presented to a wrong Court.—The proviso to the section is taken almost verbatim from sec. 21 of the Code of Civil Procedure, 1908. There was no such provision in the Provincial Insolvency Act, 1907. In the absence of any such provision it was held in a Calcutta case that if a petition was presented to a wrong Court and an order of adjudication was made on the petition, the Appellate Court was bound to entertain the objection and set aside the adjudication, even if no objection to the place of presentment was taken in the Court which made the order.

(*h*) *Madho Pershaud v. A. L. Walton* (1913) 18 C. W. N. 1050, 1051, 20 I. C. 370.

(*i*) *Re Erskine* (1893) 10 T. L. R. 32.

(*j*) *Kani Ayer v. Official Receiver, Tanjore*, 93 I. C. 914, ('26) A. M. 228. See Prov. I. A., s. 36.

(*k*) *Re A Debtor* (1927) 1 Ch. 97.

(*l*) *Gokuldoss Govardhandoss v. Parry and Co.* (1925) 48 Mad. 795, 91 I. C. 127, ('25) A. M. 1249.

(*m*) Prov. I. A., s. 10 (1) (c).

(*n*) *Re Erskine* (1893) 10 T. L. R. 32; *Madho Pershaud v. A. L. Walton* (1913) 18 C. W. N. 1050, 20 I. C. 370.

It was also held in that case that the provisions of sec. 21 of the Code of Civil Procedure, 1908, which relate to suits did not apply to insolvency petitions (o). It was to supersede this decision that the proviso was added to this section. The result is that no objection to the place of presentment will now be allowed in appeal or revision unless it was taken in the Court by which the petition was heard at the earliest possible opportunity and unless there has been a consequent failure of justice (p).

(o) *Madho Pershaud v. A. L. Walton*
(1913) 18 C. W. N. 1050, 20
I. C. 370.

(p) *Periya Karuppan Chettiar v.*
Angappa Chettiar ('25) A. M. 483,
86 I. C. 229.

I.—CREDITOR'S PETITION.

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193. Conditions on which creditor may petition (s. 9).—Assuming an act of insolvency to have been committed, and assuming that it is committed by a person who is a "debtor" within the meaning of the Act (g), none the less a creditor is not entitled to present a petition against the debtor unless certain additional conditions are fulfilled. The conditions which must be fulfilled before a creditor may petition under the Provincial Insolvency Act are the same as those laid down in sec. 12 of the Presidency-towns Insolvency Act. These have already been considered in paragraphs 148 to 156 above.

194. Petition to be in writing and verified (s. 12).—Every creditor's petition must be in writing and must be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints. The rules as to the signing and verification of plaints are contained in O. 6, rr. 14 and 15, of the Code of Civil Procedure, 1908. As to amendment of petition, see para. 158 above.

195. Contents of creditor's petition [s. 13 (2)].—Every petition presented by a creditor must contain the following particulars, namely :—

- (a) the place where the debtor ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody ;
- (b) the act of insolvency committed by the debtor and the date thereof ; and
- (c) the amount and particulars of his pecuniary claim against the debtor.

196. Admission of petition (s. 18).—The procedure laid down in the Code of Civil Procedure, 1908, with regard to the admission of plaints must, so far as it is applicable, be followed in the case of a petition. The rules as to admission of plaints are laid down in O. 4, r. 1, and O. 7, r. 9, of the Code.

197. Fixing of date for hearing (s. 19).—Where a creditor's petition is admitted, the Court is required to make an order fixing the date for hearing the petition. Notice of the order should be given in such manner as may be prescribed by the Rules framed under the Act (r), and the notice must also be served on the debtor.

198. Facts to be proved at the hearing of creditor's petition [s. 24 (1)].—At the hearing the Court will require proof of the following matters, namely,—

- (1) That the creditor is entitled to present the petition (s). One of the conditions necessary to entitle a creditor to present an

(g) See *Jagan Nath v. Ram Saran* ('29)

A. L. 239, 115 I. C. 419.

(r) *Darrah v. Fazal Ahmad* ('26) A.L.

360, 93 I. C. 903.

(s) Prov. I. A., s. 9.

insolvency petition against a debtor is that the debt owing to him by the debtor amounts to Rs. 500. If the debtor denies that he owes any debt to the creditor or that the debt amounts to Rs. 500, it is for the Insolvency Court to inquire into the matter, and it should not refer the creditor to a suit to establish the debt (*t*).

- (2) That the debtor, if he does not appear, has been served with notice of the order admitting the creditor's petition.
- (3) That the debtor has committed the act of insolvency alleged against him. If the debtor himself admits that he is unable to pay his debts, the acts of insolvency need not be closely scrutinized (*u*).

199. Examination of debtor [s. 24 (2), (3), (4)].—At the hearing the Court is required to examine the debtor, if he is present, as to his conduct, dealings and property, in the presence of such creditors as appear at the hearing, and the creditors have the right to question the debtor thereon. The Court must, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to be necessary for the proper disposal of the petition. A memorandum of the substance of the examination of the debtor and of any other oral evidence given is to be made by the Judge, and it will form part of the record of the case.

200. Scope of the examination.—If the debtor is present in Court there is an obligation on the Court to examine him. Failure to examine him vitiates the order of adjudication (*v*). From this it does not follow that every matter which forms the subject of the debtor's examination must be decided before an order of adjudication is made. It is not for the Court to decide before an order of adjudication is made whether the debts stated in the petition are real debts (*w*) or whether the debtor has made a true and full disclosure of his property in the petition (*x*), or whether he has fraudulently transferred his property (*y*). These are matters which ought to be inquired into at the hearing of the application for his discharge. See para. 209 below.

201. Dismissal of creditor's petition [s. 25 (1)].—If the creditor does not satisfy the Court (1) that he is entitled to petition (*z*), (2) that the notice of the order admitting the petition has been duly served, and (3) that

(*t*) *Chetty Firm v. Maung Aung Bwint* ('23) A. R. 21, 68 I. C. 885.

(*u*) *Ramasami v. Narayanasami* ('25) A. M. 483, 86 I. C. 229.

(*v*) *Gangadas v. Percival* ('27) A. C. 32, 97 I. C. 792; *Ananta Kumar v. Sadhu Charan* ('28) A. C. 234, 87 I. C. 751.

(*w*) *Jeer v. Rengasami* (1913) 36 Mad. 402, 12 I. C. 618.

(*x*) *Laxmi Bank, Limited, Poona v. Ramchandra* (1922) 46 Bom. 757, 67 I. C. 238; ('22) A. B. 80.

(*y*) *Ghulam Husain v. Rameswar Das* ('27) A. L. 108, 99 I. C. 524.

(*z*) Prov. I. A., s. 9.

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the debtor has committed the act of insolvency alleged against him, the petition will be dismissed. Even if these facts are proved, the Court will dismiss the petition if it is satisfied by the debtor that he is able to pay his debts, or that for *any other sufficient cause* no order ought to be made.

201A. Dismissal of creditor's petition and res judicata.—The dismissal of a creditor's petition under O. 9, r. 2, of the Code of Civil Procedure, 1908, for default in payment of process-fees does not operate as res judicata so as to bar a subsequent petition on the same facts (a).

202. Debtor as a witness.—As regards proof of the petitioning creditor's debt, the debtor himself may be called by the creditor as a witness and he may be required to produce his books for the purpose of proving the allegations in the petition. See the cases cited in para. 160 above.

203. Inquiry into consideration for debt.—The Court has the power to inquire into the consideration for the debt, even if the debt is a judgment-debt. This subject has been discussed in para. 161 above.

204. Dismissal of creditor's petition if service of notice on debtor not proved.—If the debtor does not appear at the hearing, the creditor must prove service on the debtor of the notice of the order admitting the petition. If the Court is not satisfied with the proof of service, the petition must be dismissed. Omission to serve the notice is not a mere irregularity (b). The notice must be served in the manner prescribed for the service of summons in O. 5 of the Code of Civil Procedure, 1908. If the debtor resides outside the jurisdiction but has an agent holding a general power of attorney to carry on his business within the jurisdiction, service of the notice on the agent is good service (c). If no notice has been served and the debtor is adjudged insolvent, the order of adjudication must be annulled. The fact that the debtor knew all about the adjudication is not equivalent to service of notice (d).

205. Dismissal of creditor's petition for sufficient cause.—The petition must be dismissed if the insolvency proceedings are used for the inequitable purpose of extortion or if they constitute an abuse of the process of the Court (e). This subject has been discussed in paras. 165, 166 and 167 above.

- (a) *Abdul Aziz v. Habid Mistri* (1919) 49 I. C. 229; *Chauthmal v. Khem Karan Das* ('28) A. P. 116.
(b) See *Nathmull v. Goneshnul* (1921) 34 Cal. L. J. 349, 66 I. C. 886 ('21) A. C. 106; *Komura Sami v. Govind* (1887) 11 Mad. 136; *Moolchand v. Sarjoog Pershad* (1901) 7 Cal. L. J. 268.

- (c) *Kallianji v. The Bank of Madras* (1916) 39 Mad. 693, 31 I. C. 583.
(d) *Doraiswami Chetty v. The Official Assignee of Madras* (1926) 51 Mad. L. J. 130, 95 I. C. 446, ('26) A. M. 946.
(e) *Ex parte Harsukdas v. Balkissendas* (1924) 39 Cal. L. J. 512, 83 I. C. 941, ('24) A. C. 964.

206. Order of adjudication on creditor's petition (s. 27).—If the Court does not dismiss the petition, it *shall* make an order of adjudication. **Paras. 206, 207**

207. Publication of order of adjudication (s. 30).—Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made, must be published in the local official Gazette and in such other manner as may be prescribed by the Rules.

II.—DEBTOR'S PETITION.

Paras. 208, 209 **208.** Conditions on which debtor may petition [s. 10 (1)].—A debtor is not entitled to present an insolvency petition unless—

- (1) he is unable to pay his debts, *and*
- (2) (a) his debts amount to Rs. 500 ; *or*
- (b) he is under arrest or imprisonment in execution of a decree for the payment of money ; *or*
- (c) an order of attachment in execution of a decree for the payment of money has been made and is subsisting against his property.

The conditions necessary to entitle a debtor to present a petition are (a) that he is unable to pay his debts and (b) that one of the three facts mentioned in clause (2) above exists (f).

209. The debtor must be unable to pay his debts [s. 24 (1) (a)].—As under the Provincial Insolvency Act, 1907 (g), so under the Provincial Insolvency Act, 1920 (h), a debtor's petition must contain a statement that he is unable to pay his debts. The Provincial Insolvency Act, 1920, however, contains a further provision that a debtor is *not entitled to present* an insolvency petition unless *inter alia* he is unable to pay his debts (i). In other words, inability to pay debts is made a condition precedent to the *presentation* of a debtor's petition. The debtor, however, has not to furnish at the hearing of his petition conclusive proof as to his inability to pay his debts. He has to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing that he is unable to pay his debts, and the Court, if and when so satisfied, is not bound to hear any further evidence. The Court is not required to go into an elaborate inquiry as to the validity or otherwise of the debts. It is sufficient if the Court is satisfied that there are *prima facie* grounds for believing that the debtor is unable to pay his debts (j). If the debtor deposes to his inability to pay his debts and his evidence is not disbelieved, the Court should not refuse to make an order of adjudication because he has not called independent evidence to prove his inability to pay his debts (k). If there are *prima facie* grounds for believing that he is unable to pay his debts, the Court should not hold an inquiry for the purpose of determining

(f) Prov. I. A., s. 25 (2); *Gobind Prasad v. Kishun Lall* ('24) A. P. 166, 59 I. C. 622.

(g) S. 11 (1) (a).

(h) S. 13 (1) (a).

(i) A petition presented under the Act of 1907 should be disposed of under that Act, and not under the Act of 1920, though it is heard after the latter Act came into force: *Mohiruddin v. Gayan Nath* (1929) 33 C. W. N. 221, ('29) A.C. 315. See also *Kali Kumar Das v. Gopi Krishna Ray* (1911) 15 C. W. N. 990, 12 I. C. 48.

(j) Prov. I. A., s. 24 (1) (a); *Mul Singh v. Ram Singh* (1924) 6 Lah. L. J. 306, 89 I. C. 325, ('24) A. L. 724; *Manindra Nath Roy v. Rasik Lal*, ('27) A. C. 69, 97 I. C. 463; *Lakshminarayana Aiyar v. Subramania Aiyar* (1923) 45 Mad. L. J. 129, 73 I. C. 74, ('23) A. M. 585; *Ram Rattan v. Nathu Ram*, ('29) A.L. 87, 109 I.C. 552; *Moti Ram v. Kewal Ram* ('28) A. L. 202, 105 I. C. 569, 9 Lah. L. J. 550.

(k) *Bholai Karaim v. Desai* (1925) 100 I. C. 1004, ('27) A. R. 329.

whether some of the debts mentioned in his petition are real debts (*l*), or whether there has been fraudulent concealment of his property, or whether he has transferred his property *benami* to defraud his creditors. These are matters to be dealt with upon the debtor's application for his discharge (*m*). But the petition must be dismissed if the Court has reasons to believe that all or almost all the debts are fictitious (*m1*). The fact that the debtor's father is a rich man (*n*) or that he has a chance of succeeding as heir to a rich parent or relation (*o*) are matters absolutely foreign to the inquiry.

The burden of proving that the debtor is unable to pay his debts lies on the debtor (*p*). If the debtor fails to make out a *prima facie* case, the petition must be dismissed (*q*).

The expression "unable to pay his debts" means that the market value of the realizable assets is less than the total amount of the debts (*r*). If the petition itself shows that the assets exceed the liabilities, the debtor must show that the assets, if realized, would be less than the liabilities; otherwise the petition should be dismissed (*s*). It is the value of the assets, if realized, which is the determining factor, and not their value on paper (*t*). The fact that the only property to which the petitioning debtor is entitled is his share in the joint family property of which he cannot, under the Hindu law, enforce partition during the life-time of his father, is no ground for holding that the debtor has no property available for payment of his creditors. His interest in the property is alienable notwithstanding the restriction, and its value must be taken into consideration in determining whether he is unable to pay his debts (*t1*). Further, lands cannot be said to have no market value because they are inalienable by statute except upon certain conditions, *e.g.*, without the previous consent of the landlord (*u*), or except to a certain class of persons (*v*).

The petition should not be dismissed merely because upon a nice calculation of the value of the assets it might be possible to hold that the

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| <p>(<i>l</i>) <i>Narayanappa v. Bheemappa</i> (1926) 92 I. C. 541, ('26) A. M. 494; <i>Uday Chand Maithi v. Ram Kumar Khara</i> (1910) 15 C. W. N. 213, 7 I. C. 394.</p> <p>(<i>m</i>) <i>Keramat Ali v. Raida Nath</i> ('26) A. C. 955, 95 I. C. 297; <i>Bhagirath v. Mt. Jamuni</i> ('27) A. P. 188, 101 I. C. 445; <i>Narayan Mistri v. Ram Das</i> (1928) 7 Pat. 771, 111 I.C. 647, ('28) A. P. 477; <i>Rasul Baksh v. Gulab Rai</i> (1929) 4 Luck. 52, 113 I. C. 20, ('29) A. O. 371; <i>Perianambi v. Narasimha</i> (1929) 56 Mad. L.J. 597, 113 I.C. 290, ('28) A.M. 1193; <i>Chaudhari Rasul Baksh v. Gulab Rai</i> (1929) 4 Luck. 52, 113 I. C. 20, ('29) A.O. 371.</p> <p>(<i>m1</i>) <i>Perianambi v. Narasimha</i> (1929) 113 I.C. 290, ('28) A. M. 1193, 56 Mad. L.J. 597.</p> <p>(<i>n</i>) <i>Thakar Singh v. Hardi Singh</i> ('28) A.L. 237, 106 I. C. 574.</p> <p>(<i>o</i>) <i>Ghulam Haider v. Durga Das</i> ('27) A. L. 136, 99 I. C. 7.</p> | <p>(<i>p</i>) <i>Moti Ram v. Kewal Ram</i> ('28) A. L. 202, 105 I. C. 569, 9 Lah. L. J. 550.</p> <p>(<i>q</i>) Prov. I. A., s. 25 ('2).</p> <p>(<i>r</i>) <i>Ponnusami Chetty v. Narasimma</i> (1913) 25 Mad. L. J. 545, 21 I. C. 293; <i>Jowalla Nath v. Parbatty Bibi</i> (1887) 14 Cal. 691; <i>Baldeo Das v. Sukhdeo Das</i> (1897) 19 All. 125; <i>Perianambi v. Narasimha</i> (1929) 113 I.C. 290, ('28) A.M. 1193, 56 Mad. L. J. 597.</p> <p>(<i>s</i>) <i>Moti Ram v. Kewal Ram</i> ('28) A. L. 202, 105 I. C. 569, 9 Lah. L. J. 550; <i>Dad Khan v. Chandi Ram</i> ('25) A. L. 630, 89 I. C. 585.</p> <p>(<i>t</i>) <i>Ram Rattan v. Nathu Ram</i> ('29) A. L. 87, 109 I. C. 552.</p> <p>(<i>t1</i>) <i>Bhagirath Lal v. Kanwal Narain</i> (1929) 11 Lah. L.J. 490.</p> <p>(<i>u</i>) <i>Barkat Ali v. Gurditta</i> (1926) Punj. L. R. 422, 423.</p> <p>(<i>v</i>) <i>Moti Ram v. Kewal Ram</i> ('28) A. L. 202, 105 I. C. 569, 9 Lah. L. J. 550.</p> |
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value of the assets exceeds the amount of liabilities (*w*). Whatever the order of the Court may be, the Court should in each case record the reasons for its finding (*x*).

Where a debtor against whom an insolvency petition is presented alleges that he is able to pay his debts, and to show his ability to pay the debts deposits in Court the amount of the petitioning creditor's debt under protest, the petitioning creditor is not entitled to withdraw the amount (*x1*).

Sec. 10 of the Provincial Insolvency Act, 1920, lays down that a debtor shall not be entitled to present an insolvency petition, *unless he is unable to pay his debts*. All that was required by the Provincial Insolvency Act (s. 11), 1907, was that the petition *should contain a statement that the debtor was unable to pay his debts*. Under that Act inability to pay the debts was not a condition precedent to the presentation of the petition as it is under the Act of 1920. It was accordingly held under that Act by Jenkins, C.J., that a debtor's petition cannot be dismissed on the ground that he could not satisfy the Court that he was unable to pay his debts (*y*). On the other hand, it was held by Macleod, C.J., that the Court had the power even under the Act of 1907 to dismiss the petition if the Court was satisfied either on the face of the proceedings or on a representation of the opposing creditor that the statement in the petition that the debtor was unable to pay his debts was not correct, and that there was no material difference in this respect between the Act of 1907 and that of 1920 (*z*). It is submitted that the view taken by Jenkins, C.J., is correct. It is also submitted that the Act of 1920 has made a change in the law, that inability to pay debts is now a condition precedent to the presentation of a debtor's petition, and that the Court is obliged under the Act of 1920 to dismiss the petition if that condition is not complied with, thus exercising a power which it had not under the Act of 1907 (*a*). The object of the change was to prevent the abuse of the debtors filing their petitions as a method of evading liability of arrest in execution of decrees against them (*b*). It is by no means certain that the object has been attained, having regard to the limitations imposed upon the powers of the Court as to the scope of inquiry. It is not suggested that the Court should have larger powers of inquiry at this stage, but it is merely stated that the change in the law has been fruitful of considerable litigation without producing any appreciable advantage for the creditors as could be seen from the large mass of cases cited in this paragraph.

210. Debts must amount to Rs. 500.—This subject has been considered in para. 172 above under the same heading.

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| <p>(w) <i>Mul Singh v. Ram Singh</i> (1925) 6 Lah. L. J. 306, 89 I. C. 325, ('24) A. L. 724; <i>Amir Chand Mahesh Das v. Bhag Singh</i> (1928) 10 Lah. L. J. 493, 114 I. C. 54, ('29) A. L. 49.</p> <p>(x) <i>Mathura Ram v. Baldeo Ram</i> ('24) A. A. 800, 80 I. C. 21.</p> <p>(x1) <i>Ko Maung Gyi v. P. L. M. Chettyar Firm</i> ('29) A.R. 338.</p> <p>(y) <i>Kali Kumar Das v. Gopi Krishna Ray</i> (1911) 15 C. W. N. 990, 12 I. C. 48; <i>Bidhata Din v. Jagannath</i> (1912) 9 All. L. J. 699, 14 I. C.</p> | <p>570. Compare s. 351 of the Code of Civil Procedure, 1882, and see <i>Jowalla Nath v. Parbatty Bibi</i> (1887) 14 Cal. 691; <i>Mehr Singh v. Duya Nand College</i> (1918) Punj. Rec. No. 27, p. 106, 44 I. C. 850.</p> <p>(z) <i>Laxmi Bank, Limited, Poona v. Ramchandra</i> (1922) 46 Bom. 757, 67 I. C. 238, ('22) A. B. 80.</p> <p>(a) <i>Gobind Prasad v. Kishun Lall</i> ('24) A. P. 166, 69 I. C. 622.</p> <p>(b) <i>Mathura Ram v. Baldeo Ram</i> ('24) A. A. 800, 80 I. C. 21.</p> |
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211. Arrest or imprisonment of debtor.—The arrest or imprisonment must be subsisting at the time of the presentation of the petition (c). It is sufficient if the debtor is under arrest; it is not necessary that he should also be in prison.

212. Attachment of debtor's property in execution of decree.—The property attached must be the debtor's property (d). The attachment must be in execution of a decree for the payment of money, and it must be subsisting at the time of the presentation of the petition (e). An attachment before judgment is not an attachment in execution of a decree (f).

213. Petition by debtor whose adjudication has been annulled for failure to apply for discharge. [s. 10 (2)].—Every order of adjudication must specify the period within which the debtor must apply for his discharge. The Court may, if sufficient cause is shown, extend the period (g). If the debtor does not apply for his discharge within the period specified by the Court, the order of adjudication must be annulled (h).

A debtor in respect of whom an order of adjudication whether made under the Presidency-towns Insolvency Act or under this Act has been annulled, owing to his failure to apply or to prosecute an application for his discharge, is not entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court must not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.

If a petition is presented without leave of the Court by which the former adjudication was annulled, and an order of adjudication is made upon the petition, the adjudication may be annulled (i). To preclude the possibility of a debtor snatching an order of adjudication on a second petition presented without the leave of the Court where such leave was necessary, the Act provides that every debtor's petition should contain a statement whether he has on any previous occasion filed a petition and whether if an order of adjudication was made, the order was annulled, and, if so, on what ground (j).

The Provincial Insolvency Act, 1907, did not contain any provision for fixing a period within which the debtor must apply for his discharge or for obtaining leave of the Court in cases where an order of adjudication had been annulled owing to the debtor's failure to apply for his discharge within the time prescribed by the Court. This provision was first

(c) *Jumai v. Muhammad Kazim Ali* (1903) 25 All. 204.

(d) *Harish Chandra Mukherjee v. The East India Coal Co., Ltd.* (1912) 16 C. W. N. 733, 14 I. C. 576.

(e) See *Jumai v. Muhammad Kazim Ali* (1903) 25 All. 204, 206.

(f) *Makhan Lal v. Gulzari Mal* (1884) 6 All. 289.

(g) Prov. I. A., s. 27.

(h) Prov. I. A., s. 43 (1).

(i) Prov. I. A., s. 35.

(j) Prov. I. A., s. 13 (1) (f).

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introduced by the Provincial Insolvency Act, 1920, the object being to compel the debtor to apply for his discharge so that his malpractices, if any, should be investigated, and if he did not so apply, to preclude him from presenting a 'second petition for his adjudication without the leave of the Court by which the former adjudication was annulled. This matter is discussed fully in para. 175 above.

213-A. Petition for adjudication by undischarged insolvent.—Sec. 10 (2) of the Provincial Insolvency Act applies in terms to the case where an adjudication has been *annulled* owing to failure on the part of the debtor to apply or to present an application for his discharge. Where the adjudication has been annulled, the debtor cannot present a second petition without the leave of the Court by which it was annulled. Where the adjudication has not been annulled, the question arises whether the insolvent can present a petition for his own adjudication. It has been held in one case that it is not open to an undischarged insolvent to apply for a second order of adjudication on a fresh petition (*k*). This subject is discussed in para. 181A above.

214. Petition to be in writing and verified (s. 12).—Every debtor's petition must be in writing and must be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints. The rules as to the signing and verification of plaints are contained in O. 6, rr. 14 and 15 of the Code.

215. Contents of debtor's petition [s. 13 (1)].—Every petition presented by a debtor must contain the following particulars, namely,—

- (a) a statement that the debtor is unable to pay his debts; see para. 209 above;
- (b) the place where he ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody;
- (c) the Court (if any) by whose order he has been arrested or imprisoned, or by which an order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made;
- (d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him;
- (e) the amount and particulars of all his property, together with—
 - (i) a specification of the value of all such property not consisting of money;
 - (ii) the place or places at which any such property is to be found; and

(*k*) *Ramdas v. Sultan Husain Khan* ('29) A. O. 149, 115 I. C. 107.

- (iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree [see Provincial Insolvency Act, sec. 28 (5)].
- (f) a statement whether the debtor has on any previous occasion filed a petition, to be adjudged an insolvent, and (where such a petition has been filed)—
 - (i) if such petition has been dismissed, the reasons for such dismissal, or
 - (ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and if so, the grounds therefor.

216. Particulars of debtor's property and of claims against him.—An issue whether the debtor has made a true and full disclosure of his property or whether the particulars of claim against him are correct is not pertinent at the preliminary inquiry held for considering whether an order of adjudication should be made. If the particulars required by the section are given, the Court has no power to refuse an order of adjudication on the ground that the particulars are not correct (*l*).

217. Admission of petition (s. 18).—The procedure laid down in the Code of Civil Procedure, 1908, with regard to the admission of complaints, must, so far as it is applicable, be followed in the case of a debtor's petition. The rules as to the admission of complaints are laid down in O. 4, r. 1, and O. 7, r. 9, of the Code.

218. Fixing of date for hearing (s. 19).—Where a debtor's petition is admitted, the Court is required to make an order for fixing a date for hearing the petition. Notice of the order is to be given to creditors in the manner prescribed by the Rules framed under the Act.

219. Facts to be proved at the hearing of debtor's petition [s. 24 (1) (a)].—At the hearing the Court will require the debtor to prove that he is entitled to present the petition (*m*). For the purpose, however, of proving his inability to pay his debts the debtor will be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same. The Court, if and when so satisfied, is not bound to hear any further evidence thereon. This subject is dealt with in para. 209 above.

(*l*) *Laxmi Bank, Limited, Poona v. Ramchandra* (1922) 46 Bom. 757, | 67 I. C. 238, ('22) A. B. 80.
(*m*) Prov. I. A., s. 10 (1).

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220. Examination of debtor [s. 24 (2), (3), (4)].—At the hearing of the petition the Court must examine the debtor, if he is present, as to his conduct, dealings and property, in the presence of such creditors as appear at the hearing, and the creditors have the right to question the debtor thereon. The Court, if sufficient cause is shown, should grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition. A memorandum of the substance of the examination of the debtor and of any other oral evidence given is to be made by the Judge and forms part of the record of the case. See para. 200 above.

221. Dismissal of debtor's petition (s. 25).—A debtor's petition must be dismissed if the Court is not satisfied with the proof of his right to present the petition. The right of a debtor to present a petition depends upon the fulfilment of the conditions laid down in sec. 10 (1). For that purpose he must prove, *first*, that he is unable to pay his debts, and, *secondly*, one of the three following facts, namely, that his debts amount to Rs. 500, or that he is under arrest or imprisonment in execution of a money decree, or that an order has been made for attachment of his property and that it is subsisting at the time of the presentation of the petition. If *both* these facts are proved, the debtor is entitled as of right to an order of adjudication. But if either of these facts is not proved, the petition should be dismissed. If the petition is dismissed, the Court should state the specific grounds on which it is dismissed (n). See para. 223 below.

221A. Dismissal of debtor's petition and res judicata.—The dismissal of a debtor's petition for default does not operate as res judicata so as to bar a second petition on the same facts. Similarly where a debtor's petition is dismissed on the ground that the evidence to prove his inability to pay his debts was not sufficient to prove it, the dismissal does not operate as res judicata (o).

222. Order of adjudication on debtor's petition [s. 27 (1)].—If the Court does not dismiss the petition, it *shall* make an order of adjudication. The Court has no power to make a conditional order of adjudication (ol).

223. Refusal to adjudicate on debtor's petition on ground of abuse of process of Court.—The question now arises whether, if the debtor satisfies the Court that he is entitled to present the petition, in other words, if he proves that the conditions which entitle him to present the petition, being the conditions laid down in sec. 10, are complied with, a Court exercising jurisdiction under the Provincial Insolvency Act has the

(n) *Preonath Roy v. Nibaran Chandra Sarkar* (1912) 15 Cal. L. J. 631, 15 I. C. 870.

(o) *Hasan Din v. Kirpa Ram* ('28)

A. L. 374, 109 I. C. 86.
(ol) *Sayedgahar Ali v. Musammatt Musharakan Niseabibi* (1930) 9 Pat. 304.

power to dismiss the petition on the ground that the presentation of the petition is an abuse of the process of the Court. **Para. 223**

Before proceeding further it may be useful to state what the law was under the Insolvency Chapter of the Code of Civil Procedure, 1882. Under sec. 351 of that Code the Court could grant an insolvency application only if it was satisfied that the debtor had not transferred any part of his property with intent to defraud his creditors, that he had not recklessly contracted debts or given an unfair preference to any of his creditors, and that he had not committed any other act of bad faith regarding the matter of the application.

Prior to the decision of the Privy Council in *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram* (p), a case under the Provincial Insolvency Act, 1907, there was a conflict of opinion whether, even if the Court was satisfied that the debtor was entitled to present the petition, the Court had power under the Provincial Insolvency Act, 1907, to dismiss the petition on other grounds, e.g., that the presentation of the petition was an abuse of the process of the Court. In a Madras case it was held that resort to the bankruptcy laws by a debtor for his own convenience in order to have the property administered through the Court was an abuse of the process of the Court and should not be tolerated (q). In an Allahabad case it was held that the Court had power to dismiss the debtor's petition if it appeared on his preliminary examination that he was fraudulently concealing his documents or was fraudulently understating the amount of his assets (r). In a Full Bench case before the Allahabad High Court it was said: "We are very far from saying that there is no inherent power for the Court by its orders in insolvency matters to prevent an abuse of the process of the Court; and in certain cases it may be quite necessary to dismiss a debtor's own petition to be adjudicated an insolvent. All that is necessary for us to say in the present case is that in our opinion the presentation by the debtor of his petition in this case did not amount to an abuse of the process of the Court" (s). On the other hand, it was held in a series of cases that once the Court was satisfied that the debtor was entitled to present the petition, the Court had no power to dismiss the petition on the ground that the debtor had made fraudulent transfers of his property or that he had recklessly contracted debts or given undue preference to some of his creditors (t), or on the ground that he had committed acts of bad faith (u) or concealed his property (v).

Chhatrapat Singh Dugar's case, as stated above, was a case under the Provincial Insolvency Act, 1907. In that case the High Court of Calcutta dismissed the debtor's petition for adjudication on the ground of the debtor's

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| <p>(p) (1916) 44 I. A. 11, 44 Cal. 535, 39 I. C. 788.</p> <p>(q) <i>Ponnusami Chetti v. Narasimna Chetti</i> (1913) 25 Mad. L. J. 545, 21 I. C. 293; <i>Jeer v. Rangasami</i> (1913) 36 Mad. 402, 12 I. C. 618.</p> <p>(r) <i>Nathu Mal v. District Judge of Benares</i> (1910) 32 All. 547, 549, 6 I. C. 870.</p> <p>(s) <i>Triloki Nath v. Badri Das</i> (1914) 36 All. 250, 23 I. C. 4.</p> <p>(t) <i>Girwardhari v. Jai Narain</i> (1910)</p> | <p>32 All. 645, 7 I. C. 39; <i>Sheikh Samiruddin v. Shrimati Kadumoyi Dasi</i> (1910) 15 C. W. N. 244, 7 I. C. 691.</p> <p>(u) <i>Uday Chand Maili v. Ram Kumar Khara</i> (1910) 15 C. W. N. 213, 7 I. C. 394; <i>Shaikh Abdul Razak v. Basiruddin Ahmed</i> (1912) 17 C. W. N. 405, 14 I. C. 980.</p> <p>(v) <i>Bidhata Din v. Jagannath</i> (1912) 9 All. L. J. 699, 14 I. C. 570.</p> |
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Para. 223 misconduct in relation to his creditors, though it was proved that the debtor was entitled to present the petition. The Court held that it had inherent jurisdiction in such a case to refuse to make an order of adjudication on the ground that the presentation of the petition was an abuse of the process of the Court. This decision was reversed on appeal by the Privy Council and it was held that once the conditions which entitle a debtor to present a petition for his adjudication are complied with, he is entitled as of right to an order of adjudication. It was also held that misconduct on the part of the debtor should be dealt with upon the debtor's application for his discharge, and was not a ground upon which an order of adjudication could be refused. In the course of the judgment their Lordships said: "The dismissal of Chhatrapat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. Presumably it was on this ground, too, that the High Court dismissed the appeal; no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion, but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an 'abuse of the process of the Court.' This case illustrates the peril of this doctrine in India, for what has been treated by the Courts below as such an abuse appears to their Lordships in no way to merit this censure. It may, perhaps, give rise to a contest for priority between competing creditors, but that will be, if necessary, a matter for decision hereafter in the course of the insolvency. Be that, however, as it may, their Lordships are now concerned only with the debtor's position; and as to that they are satisfied that he has complied with all the conditions specified in the Act, and is entitled as of right to an order adjudging him an insolvent. This conclusion, apart from the decision under appeal, is in agreement with the current of authority in India, where it has been rightly held that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding." The Privy Council decision has been followed in later cases where it has been held that if the Court is satisfied that the debtor is entitled to present the petition, the Court has no power to refuse to make an order of adjudication on the ground that the debtor's brother being joint with him was not made a party to the petition (w), or that the debtor might have been guilty of criminal misappropriation (x), or on the ground that he has fraudulently transferred his property (y). The language of the Provincial Insolvency Act, 1920, is much more explicit than that of the Act of 1907. Sec. 10 (1) lays down the conditions which entitle a debtor to present an insolvency petition. Sec. 25 (2) provides that the Court shall dismiss a debtor's petition if it is not satisfied

(w) *Nat Ram v. Bhagirath Sah* (1918)
40 All. 75, 43 I. C. 160.

(x) *Jagan Nath v. Ganga Dat Dube*
(1919) 41 All. 486, 50 I. C. 192.

(y) *Ram Rakha Mal v. Nazar Mal* (1918)
Punj. Rec. No. 52, p. 178, 46
I. C. 435.

as to his right to present the petition. It is quite clear from this section that the only case in which the Court can dismiss a debtor's petition is where it is not satisfied that the conditions laid down in sec. 10 (1) are complied with. Sec. 27 (1) provides that if the Court does not dismiss the petition it *shall* make an order of adjudication (2). There is no room therefore for the dismissal of a debtor's petition on the ground of abuse of process of Court. The Court has not in the case of a debtor's petition the discretion which it has in the case of a creditor's petition (a). As to cases under the Presidency-towns Insolvency Act, see para. 181 above.

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224. Fixing of time for applying for discharge [s. 27 (1)].—While making an order of adjudication the Court must specify in the order the period within which the debtor shall apply for his discharge.

225. Extension of time for applying for discharge [s. 27 (2), s. 43 (1)].—Sec. 27 (2) provides that the Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge. There is no doubt that if the application for discharge is made *before* the expiry of the period originally fixed for applying for discharge, the Court may extend the time to apply for discharge. The application for extension may be made by the debtor. It may also be made by a creditor as where proceedings have been instituted to set aside a transfer by the insolvent as fraudulent and the proceedings are pending (b). The power to extend the time may also be exercised by the Court *suo motu* (b1).

Sec. 43 (1) provides *inter alia* that if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication *shall* be annulled. There is a conflict of opinion whether if the insolvent does not apply for extension of time *within* the period originally fixed for applying for discharge, the Court has power, after the expiry of that period, to extend the time for applying for discharge under sec. 27 (2), or whether the Court should refuse to extend the time and annul the adjudication. The conflict turns upon the words "*shall be annulled*" in sec. 43 (1). It has been held in Oudh (c), following a Patna decision (c1), since overruled (c2), that sec. 43 is mandatory and that after the expiry of the original period the Court has no power under sec. 27 (2) to extend the time for applying for discharge and that the adjudication must be annulled. The same view was taken until recently by the High Court of Madras, though

(z) The relevant sections of the Prov. I. A. 1907, are s. 6 (3), s. 15 (1) and s. 16 (1).

(a) See Prov. I. A., 1920, s. 25 (1), and note the words "for any other sufficient cause" in that section. See also *Girwardhari v. Jai Narain* (1910) 32 All. 645, 649, 7 I. C. 39.

(b) *Chettiar v. Maung Myat Tha* ('27) A.R. 136, 100 I.C. 921; *Rup Singh v. The Official Receiver* (1928) 10 Lah. 357, 107 I.C. 394, ('28) A.L. 82; *Ganpat v. Harigir* ('29) A.N.11, 113 I.C. 357;

Jethaji Peraji Firm v. Krishnayya (1929) 52 Mad. 648, 654.

(b1) *Rup Singh v. Official Receiver* (1929) 10 Lah. 357, 107 I. C. 394, ('28) A. L. 82.

(c) *Amjad Ali v. Mohammad Ali* (1927) 2 Luck. 757, ('27) A.O. 506, 105 I.C. 912; *Girja Charan v. Sheoraj Singh* ('28) A. O. 376, 111 I.C. 903.

(c1) *Ram Krishna, Ex parte* (1925) 4 Pat. 51.

(c2) *Gopal Ram v. Magni Ram* (1928) 7 Pat. 375, 107 I.C. 830, ('28) A.P. 338.

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225-225B

not without a note of dissent (d). Those decisions have now been overruled by a Full Bench (d1), and brought into line with the Calcutta, Lahore, Patna, Nagpore and Sind decisions which hold that sec. 43 is directory, and not mandatory, and that the Court has power even after the expiry of the period originally fixed to extend the time to apply for discharge (e). This subject is further considered in para. 351 below.

There was no provision in the Provincial Insolvency Act, 1907, requiring the Court to fix a time within which the debtor should apply for his discharge, but this, it has been held, does not preclude the Court where the order of adjudication on a petition presented under that Act is made after the Act of 1920 came into force, from imposing a condition at the time of making the order of adjudication that the debtor should apply for his discharge within a time to be fixed by the Court, and that where such a condition is imposed and the debtor does not apply for his discharge within the fixed period, the Court has power to annul the adjudication under the Act of 1920 (f). This decision is of doubtful authority. The Act of 1920 is not retrospective and the Court can have no power to impose such a condition as it had none under the Act of 1907 (g).

No appeal lies against an order rejecting an application made under sec. 27 (2) for extension of period for the application for discharge (h).

225A. Insolvency Rules as to petition.—As to Rules under the Provincial Insolvency Act, see Calcutta Rule 2, Madras Rules IV to VIII, Bombay Rules IV to VII, Allahabad Rule 2.

225B. Insolvency Rules as to adjudication.—As to Rules under the Provincial Insolvency Act, see Calcutta Rule 6, Madras Rule XXI (1) and (9), Bombay Rule XXIV (1), Allahabad Rule 6.

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| <p>(d) <i>Chinnappa Reddy v. Thomasu Reddy</i> (1928) 51 Mad. 839, 109 I.C. 581, ('28) A.M. 265; per Waller, J., in <i>Arunagiri v. Kandaswami</i> ('24) A.M. 655, 83 I.C. 955; per Reilly, J., in <i>Jethaji Peraji Firm v. Krishnayya</i> (1929) 52 Mad. 648, 661-666. The contrary view was taken by Krishnan, J., in <i>Arunagiri's case</i>, and by Venkatasubba Rao, J., in <i>Jethaji Peraji Firm v. Krishnayya</i> (1929) 52 Mad. 648, at p. 656, and also by Devadoss and Wallace, JJ., in <i>Abbi Reddi v. Venkata Reddi</i> (1926) 51 Mad. L.J. 60, ('27) A.M. 175, 94 I.C. 351.</p> <p>(d1) <i>Pallani Goundan v. Official Receiver</i> (1930) 58 Mad. L. J. 369, ('30) A. M. 389.</p> | <p>(e) <i>Abraham v. Sookias</i> (1924) 51 Cal. 337, 81 I.C. 584, ('24) A.C. 777; <i>Lakhi v. Molar</i> ('25) A.L. 416, 86 I.C. 115; <i>Rup Singh v. Official Receiver</i> (1928) 10 Lah. 357, 107 I. C. 394, ('28) A. L. 82; <i>Gopal Ram v. Magni Ram</i> (1928) 7 Pat. 375, 107 I.C. 830, ('28) A.P. 338 [F.B.]; <i>Ganpat v. Harigir</i> ('29) A.N. 11, 113 I.C. 357; <i>Saligram v. Official Receiver</i> (1926) 91 I.C. 467, ('26) A.S. 94.</p> <p>(f) <i>Kallukuti v. Puthan</i> (1925) 49 Mad. L.J. 595, 91 I.C. 144, ('26) A.M. 123.</p> <p>(g) <i>Mohiruddin v. Gayan Nath</i> (1929) 33 C.W.N. 221, ('29) A.C. 315.</p> <p>(h) <i>In the matter of Ganga Prasad</i> ('26) A.O. 186, 92 I. C. 265.</p> |
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LECTURE V.

PART III.

I.- WITHDRAWAL, CONSOLIDATION, ETC., OF PETITIONS.

* **226. Rules relating to insolvency petitions common to both Acts.**—In the preceding pages an attempt has been made to follow the course of proceedings from the presentation of an insolvency petition up to the making of an order of adjudication. Intermediate proceedings, however, may be taken by the parties, such as the withdrawal of a petition or the consolidation of petitions. The rules as to these are the same under both the Acts, and they are considered together.

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227. Withdrawal of petition under both the Acts [P.-t. I. A., s. 13 (8), s. 15 (2); Prov. I. A., s. 14].—No petition, whether presented by a debtor or by a creditor, may be withdrawn without the leave of the Court (a). Leave to withdraw a creditor's petition should not be given without the Court being first informed of the facts of the case and the proposed terms of withdrawal, so that it may exercise its judgment as to whether the case is a proper one for allowing withdrawal. If that judgment is exercised properly, it would be wrong to hold that an honest debtor should not be allowed to rehabilitate himself in trade by coming to an arrangement with his creditor, assuming that there is no extortion on the part of the creditor. The arrangement may be one even to pay a fresh debt of increased amount. If the arrangement was not induced by extortion or pressure, the fact that the fresh debt is of a larger amount is no ground for refusing to dismiss the petition by consent or for refusing leave to withdraw the petition (b).

228. No withdrawal after adjudication.—After an order of adjudication has been made the Court has no power to give leave to withdraw the petition. Once the order is made the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge (c).

There was no provision in the Indian Insolvent Act, 1848, for the withdrawal of either a creditor's or a debtor's petition. In Bombay there was a rule framed under that Act (d) which provided for the withdrawal of petitions but said nothing as to the consequences of withdrawal. The question arose in one case (e) whether an order made by the Insolvency Court on the application of the insolvent giving him leave to withdraw his petition after a vesting order had been made amounted to a dismissal of the petition by consent so as to revest the property in the insolvent. It was held that the order giving leave to withdraw the petition did not amount to a dismissal and that the property did not revest in the insolvent. No such question

(a) *Mudappa v. Parameswara* ('25) A. M. 242, 85 I. C. 303.

(b) *Re Bebro* (1900) 2 Q. B. 316.

(c) *Re Subrati Janmahomed* (1914) 38 Bom. 200, 20 I. C. 859; *Maung Myint v. Official Assignee* (1925)

3 Rang. 313, 90 I. C. 969, ('25) A. R. 351; *In the application of Fleming Shaw & Co.* (1916) 35 I. C. 539.

(d) It was old Rule 22.

(e) *Haji Najan v. N. C. Macleod* (1908) 32 Bom. 321.

Paras. 228-230 can arise under the present Insolvency Acts as there can be no withdrawal of a petition after adjudication.

The Insolvency Court will not recognise any *private* arrangement even before adjudication between the petitioning creditor and the insolvent for the payment of the petitioning creditor's debt (*f*). A petitioning creditor is not entitled to settle his claim *out of Court* in consideration of his withdrawing from further proceedings in insolvency (*g*). The withdrawal can only be with the leave of the Court after the terms are fully disclosed to the Court.

229. Consolidation of petitions [P.-t. I. A., s. 91 ; Prov. I. A., s. 15].—It is provided by both the Acts that where two or more insolvency petitions are presented against the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them on such terms as the Court thinks fit.

The Presidency-towns Insolvency Act also gives power to the Court to consolidate proceedings where separate petitions are filed *by* joint debtors. There is no such provision in the Provincial Insolvency Act.

229A. Consolidation of petitions against partners [P.-t. I. A., s. 97].—Where an order of adjudication has been made against one partner in a firm, any petition by or against another partner in the same firm must be presented in or transferred to the Court in which the proceedings in the insolvency of the first partner are being taken and such Court may give directions for consolidating the proceedings under the petitions. Thus if one partner in a firm is adjudged insolvent by a Judge of a High Court exercising insolvency jurisdiction under the Presidency-towns Insolvency Act, and a petition is presented against another partner in the same firm in a District Court in the Presidency, the Judge is bound to transfer the petition to the High Court and consolidate the proceedings under the petitions (*g*).

Where a member of a partnership dies insolvent and an order is made for the administration of his estate in insolvency (*h*), and afterwards the surviving partner becomes insolvent, the Court has power to direct the proceedings in respect of the two estates to be consolidated (*i*).

230. Power to change carriage of petition [P.-t. I. A., s. 92 ; Prov. I. A., s. 16].—Where the petitioner does not proceed with due diligence with his petition, the Court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required in the case of a petitioning creditor.

If the petitioning creditor after having settled his claim with the debtor out of Court or for any other reason does not prosecute his petition for adjudication, the act of insolvency committed by the debtor is available to any other creditor whose debt amounts to Rs. 500, and the Court may

(*f*) *Behary Lal Sikdar v. Harsukh Das Chakmal* (1920) 25 C. W. N. 137, 61 I. C. 904.

(*g*) *Re Shivalal Rathi* (1917) 19 Bom. L. R. 365, 40 I. C. 207.

(*g*1) *V. A. V. S. Firm v. Muruganathan Chetty* (1925) 48 Mad. 514, 86 I. C. 1031, (25) A. M. 569.

(*h*) See P.-t. I. A., s. 108.

(*i*) *Re C. Greaves* (1904) 2 K. B. 493.

substitute such other creditor as petitioner (j). In *Re Maugham* (k), the act of bankruptcy on which the petition was founded was the execution by the debtor of a deed of assignment for the benefit of the general body of his creditors. The petition was dismissed by the Registrar on the ground that the petitioning creditors had assented to the deed. More than three months after the execution of the deed two non-assenting creditors applied to the County Court Judge to rescind the order dismissing the petition and asked that their names might be substituted for those of the original petitioning creditors under sec. 107 of the Bankruptcy Act, 1883, corresponding to the Indian section now under consideration. The County Court Judge made the order, but it was reversed on appeal on the ground that he had no jurisdiction to review or rescind the order made by the Registrar. In the course of his judgment Cave, J., said: "The petition had been dismissed on October 11, and no one could then present a petition founded on the act of bankruptcy constituted by the execution of the deed of assignment, as more than three months had elapsed." This case was referred to in *Re Maund* (kl), which was a case under sec. 105 of the Bankruptcy Act, 1883, corresponding to sec. 90 (4) of the Presidency-towns Insolvency Act, and the dictum of Cave, J., was approved. That was a case where the petitioning creditors' debts did not come up to the statutory amount, and the petition was sought to be amended after three months had elapsed from the date of the act of bankruptcy by adding fresh petitioners, which was not allowed. In a Madras case (l), the petitioning creditor did not appear at the hearing and an application was made by another creditor for substitution. The application was made three months after the date of the act of insolvency, and the applicant's debt had by that time been barred by limitation. The application nevertheless was granted and the order for substitution was made. Ramesam, J., observed that the remarks of Cave, J., in *Re Maugham* were *obiter* and held that an order for substitution could be made even after the expiry of three months from the date of the commission of the act of insolvency and even if the debt of the substituted creditor was barred by the law of limitation at the date of substitution, provided it was not barred at the date of the presentation of the original petition. The same view has been taken by the High Court of Rangoon (ll). The view taken by Ramesam, J., is undoubtedly correct.

Where in an appeal filed by the debtor against an order of adjudication against the petitioning creditors they do not appear at the hearing, the insolvent having settled with them, the Court may substitute as respondent another creditor whose debt is not disputed by the insolvent (m).

231. Continuance of proceedings on death of debtor
[P.-t. I. A., s. 93; Prov. I. A., s. 17].—By sec. 93 of the Presidency-towns Insolvency Act, it is provided that if a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued *as if he were alive*.

(j) See *Re Bristow* (1867) L. R. 3 Ch. App. 247, at pp. 250-251.

(k) (1888) 21 Q. B. D. 21, 23.

(kl) (1895) 1 Q. B. 194.

(l) *Venkata Hanumantha Rao v. Gangayya* (1928) 51 Mad. 594,

110 I. C. 611, ('28) A. M. 608.

(ll) *Sathappa v. A. S. Chettyar* ('29) A. R. 291, where fraud also was alleged.

(m) *In the matter of Haroon Mahomed* (1890) 14 Bom. 189.

Para. 231 By sec. 17 of the Provincial Insolvency Act it is provided that if a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued *so far as may be necessary for the realisation and distribution of the property of the debtor.*

There is no substantial difference between the two sections. The object of the italicised words at the end of sec. 17 of the Provincial Insolvency Act is to make it clear that the proceedings are to be continued for the purpose only of realising and distributing the estate of the deceased debtor (*n*).

If a debtor dies after an insolvency petition has been presented, whether by or against him, the proceedings in insolvency do not abate and they may be continued against his estate, unless the Court otherwise orders. In England it has been held that where a debtor *himself* presents an insolvency petition, but dies before the order of adjudication, the Court may adjudge him bankrupt (*o*); and the same has been held in India (*p*). Where, however, a debtor *against* whom a creditor's petition had been presented died before service of the petition upon him, the Courts in England held that there was no power under the corresponding section (sec. 108) of the Bankruptcy Act, 1883, to dispense with service or to order substituted service of the petition, and the bankruptcy proceedings must necessarily be stayed (*q*). To meet this decision it is now provided by the Bankruptcy Rule 159, that if a debtor against whom a bankruptcy petition has been filed dies before service thereof, the Court may order service to be effected on the personal representatives of the debtor or on such other person as the Court may think fit. After service of notice on the legal representative the Court can adjudge the deceased bankrupt. Similar rules have been made by the High Courts of Calcutta, Madras, Bombay, and Rangoon (*r*), and it has been held that if a debtor *against* whom a petition has been presented dies before service of petition the petition may be served on his legal representative and the deceased may be adjudged insolvent (*s*).

Where a compounding debtor dies after making default in any payment under the composition, he may be re-adjudged an insolvent under sec. 31 of the Presidency-towns Insolvency Act or under the corresponding sec. 40 of the Provincial Insolvency Act, as the case may be (*t*).

Where a debtor is adjudged insolvent on his own petition, and the creditors appeal from the order of adjudication, and the debtor dies pending the appeal, the appeal abates on his death, as the "right to sue" does not

(*n*) *Ramathai Anni v. Kannappa Mudaliar* (1928) 51 Mad. 495, 502, 110 I. C. 167, ('28) A. M. 480.

(*o*) *Re Walker* (1896) 54 L. T. 682.

(*p*) *Venkatarama Aiyar v. Official Receiver, Tinnevely* (1928) 51 Mad. 344, 109 I. C. 94 ('28) A.M. 478.

(*q*) *Re Easy* (1867) 19 Q. B. D. 538.

(*r*) As to Rules under the P.-t. I. A., see Calcutta Rule 78; Bombay Rule 64; Rangoon Rule 97 (2).

As to Rules under the Prov. I. A., see Madras Rule VII; Bombay Rule VII.

(*s*) *Ramathai Anni v. Kannappa Mudaliar* (1928) 51 Mad. 495, 110 I. C. 167, ('28) A. M. 480; *Ramesh Chandra v. Charu Chandra* (1929) 34 C. W. N. 445.

(*t*) *Hardy v. Farmer* (1896) 1 Ch. 904; *Re Krishna Kishore Adhicary* (1927) 54 Cal. 650, 105 I. C. 90, ('28) A.C. 21.

survive within the meaning of O. 22, r. 4, of the Code of Civil Procedure, 1908 (u).

Paras.
231-235

232. Power to dismiss petition against some respondents [P.-t. I. A., s. 96].—Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them.

Thus if a petition founded on a joint act of insolvency is presented against three persons, and it is found that only two have committed the act, an order of adjudication may be made against the two, and the petition may be dismissed as to the third (v). Though this section does not occur in the Provincial Insolvency Act, the same procedure will be followed in similar cases under that Act.

233. Power to stay proceedings [P.-t. I. A., s. 94].—The Court may, at any time, for sufficient reason make an order, staying the proceedings under an insolvency petition either altogether or for a limited time, on such terms and subject to such conditions as the Court thinks just. There is no such section in the Provincial Insolvency Act. As to the application of this section, see para. 179 above, "Advertisement of order of adjudication."

234. Malicious proceedings in insolvency.—There is no provision in the Presidency-towns Insolvency Act such as the one in the Provincial Insolvency Act (para. 235) for compensation for maliciously presenting an insolvency petition (v1). In the absence of any such provision the rights of the parties will be governed by the common law. According to the common law an action lies for presenting a petition or procuring an adjudication falsely and maliciously and without reasonable and probable cause, though no special damage or pecuniary loss be proved (w). The mere fact of insolvency imports damage to the credit of the debtor; it is a natural consequence, and the debtor is entitled to damages for injury to his credit and reputation (x). In such an action it must be shown that the petition has been dismissed or the adjudication annulled (y). The judgment of the Insolvency Court giving reasons for the dismissal of the petition is inadmissible in evidence against the creditor in such an action (z).

235. Compensation where petition frivolous or malicious [Prov. I. A., s. 26].—As an alternative to the common law right of action which the debtor has against the creditor for maliciously taking proceedings in insolvency (para. 234), the debtor has under sec. 26 of the

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| <p>(u) <i>Narain Singh v. Gurbaksh Singh</i> (1928) 9 Lah. 306, 107 I. C. 281, ('28) A.L. 119.</p> <p>(v) See <i>Harish Chandra Mukherjee v. The East India Coal Co., Ltd.</i> (1912) 16 C. W. N. 733, 14 I. C. 576.</p> <p>(v1) See Bombay Rule 75.</p> <p>(w) <i>Johnson v. Emerson</i> (1871) L.R. 6 Ex. 329; <i>Quartz Hill Gold Mining Co. v. Eyre</i> (1883) 11</p> | <p>Q.B.D. 674; <i>Wyatt v. Palmer</i> (1899) 2 Q. B. 106.</p> <p>(x) <i>Wilson v. United Counties Bank, Ltd.</i> (1920) A.C. 102, 120. bankruptcy of customer owing to negligence of the bank—suit by customer for damages.</p> <p>(y) <i>Metropolitan Bank v. Pooley</i> (1885) 10 App. Cas. 210.</p> <p>(z) <i>King v. Henderson</i> (1898) A.C. 720.</p> |
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**Paras.
235, 236**

Provincial Insolvency Act a summary remedy where a creditor's petition is dismissed under sec. 25 (1) and the Court is satisfied that the petition was frivolous or vexatious. In such a case the Court may, on the application of the debtor, award against the creditor such amount not exceeding Rs. 1,000 as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon, and such amount may be realised under sec. 386 of the Code of Criminal Procedure, 1898, as if it were a fine. But an award of compensation under this section will bar a suit for compensation in respect of such petition and the proceedings thereon. In a case under sec. 250 of the Code of Criminal Procedure, 1898, which also provides for compensation for false complaints, a Full Bench of the Calcutta High Court has held that the word "frivolous" indicates that the accusation was of a trivial nature, and the word "vexatious" implies that the accusation is one which ought not to have been made in a criminal Court and which is intended to harass the accused (a). It would seem that the words "frivolous" and "vexatious" have the same meaning in this section. If so, proof of malice, which is necessary in a common law action for damages, is not necessary to entitle the debtor to compensation under this section. All that has to be shown is that the petition was either frivolous or vexatious.

236. Reference of insolvency petition to arbitration.—The provisions of the Second Schedule to the Code of Civil Procedure, 1908, relating to arbitration, do not apply to proceedings in insolvency. The Insolvency Court, therefore, has no power under clause 1 of that Schedule to make an order of reference empowering the arbitrators to decide whether the debtor should be adjudicated an insolvent on a petition presented by him, even if both the debtor and the creditor join in the application for the reference (b).

(a) *Beni Madhub Kurmi v. Kumud Kumar Biswas* (1903) 30 Cal. 123, 129. The decision was under s. 250 before it was amended. See also P.-t.L.A., s. 39 (2) (g),

and the Code of Civil Procedure, 1908, s. 35A.

(b) *Ladha Singh v. Bhag Singh* (1915) P.R. No. 50, p. 143, 29 I.C. 650.

II.—INTERIM PROCEEDINGS.**Presidency-towns Insolvency Act, s. 16.**

237. Interim receiver (s. 16.)—The Court may, if it is shown **Para. 237**
to be necessary for the protection of the estate, at any time after the presentation of an insolvency petition and before an order of adjudication is made, appoint the Official Assignee to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or any part thereof; the Official Assignee has thereupon such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908, as may be prescribed by the Rules.

Powers of interim receiver.—The power to appoint an interim receiver is discretionary. It is to be exercised for the preservation of the assets between the time of the presentation of the petition and the making of an order of adjudication. The High Court also has the power to appoint an interim receiver pending an appeal by the debtor from an order refusing adjudication (c). The Official Assignee may be appointed interim receiver. An interim receiver can only exercise such of the powers conferrable on a receiver under O. 40, r. 1, of the Code of Civil Procedure, 1908, as the Court may direct. The debtor's property, however, does not vest in an interim receiver in any case. It vests only in the Official Assignee on the adjudication of the debtor.

(c) *Abdul Razak v. Basiruddin Ahmed* |
(1910) 14 C. W. N. 586, 6 I. C. |

95 [Prov. I. A., 1907].

III.—INTERIM PROCEEDINGS.

Provincial Insolvency Act, ss. 20, 21, 22, 23.

Para. 238 **238. Interim receiver (s. 20).**—The Court when making an order admitting the petition may, and where the debtor is the petitioner ordinarily must, appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver will thereupon have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct. If an interim receiver is not so appointed, the Court may make such appointment at any subsequent time before adjudication, and the provisions of sec. 20 shall apply accordingly. The provisions of sec. 56 which relate to Receivers appointed after an order of adjudication has been made apply, so far as may be, to interim receivers [s. 56 (5)].

Powers of interim receiver.—An interim receiver may be appointed at the time of making an order admitting the petition or at any subsequent time before adjudication. The object of appointing an interim receiver is to preserve the assets for the benefit of the general body of creditors (*d*). The interim receiver will have such of the powers conferrable on a receiver under O. 40, r. 1, of the Code of Civil Procedure, 1908, as the Court may direct. Thus an interim receiver is not entitled to have an execution sale set aside under the provisions of O. 21, r. 89, by making the deposit required by that rule, unless the Insolvency Court has conferred upon him all the powers of an owner under O. 40, r. 1, of the Code (*e*). Whatever may be the powers conferred upon an interim receiver, the property of the debtor does not vest in him as it does in a Receiver appointed after adjudication under sec. 56 of the Act. The Appellate Court also has the power to appoint an interim receiver pending an appeal by the debtor from an order refusing adjudication (*f*).

The Court has a discretion on a creditor's petition to appoint an interim receiver. In exercising its discretion the Court will have regard to the necessity of protecting the estate. Where the debtor is the petitioner, the Court "ordinarily shall" appoint an interim receiver. The word "ordinarily" shows that it is not bound to do so in every case. At the same time the word "shall" indicates that unless the appointment is clearly unnecessary, the Court is to make it.

(*d*) *Mudhu Sardar v. Khitish Chandra Banerjee* (1915) 42 Cal. 289, at p. 292, 30 I. C. 82.

(*e*) *Official Receiver, Tanjore v. Sankara Aiyar* (1928) 50 Mad. L. J. 239, 93 I. C. 271, ('26) A.M. 357; see

also *Subramania Aiyar v. Official Receiver* (1926) 50 Mad. L. J. 665, 93 I. C. 877, ('26) A.M. 432.

(*f*) *Abdul Razak v. Basiruddin Ahmed* (1910) 14 C. W. N. 588, 6 I. C. 95.

In England an interim receiver may be appointed at any time after the presentation of the petition and before the making of a receiving order (*g*). Further, in England what is called a receiving order precedes an order of adjudication. A receiving order in England is made under circumstances in which an order of adjudication would be made in India (*h*). It is stated in some of the text books that an order appointing an interim receiver in India stands on the same footing as a receiving order in England, but this is not correct. Decisions bearing on the word “shall” in sec. 8 of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, sec. 6] which relate to the making of a receiving order on a debtor’s petition, have no bearing on the provisions of the Indian section as to the appointment of an interim receiver.

239. Interim orders against debtor (s. 21).—At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, either of its own motion or on the application of any creditor, make one or more of the following orders namely :—

(1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and direct that, in default of giving such security, he shall be detained in the civil prison ;

(2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ;

(3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary :

Provided that an order under clause (2) or clause (3) should not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court,—

(i) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or

(ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid.

(*g*) B. A., 1914, s. 8.

(*h*) As to where a receiving order may be made in England, see B. A.,

1914, s. 5 (2) and s. 6 (2). As to the effect of a receiving order, see B. A., 1914, s. 7.

**Paras.
239, 240**

When orders may be made.—The power given to the Court under this section to require the debtor to give security for his appearance may be exercised by the Court even before deciding the question whether the debtor has committed the act of insolvency alleged by the petitioning creditor, though the debtor has denied that he has committed any such act (i). No order can be made under sec. 21 *after* adjudication.

Object is to secure debtor's property.—Under this section the Court may (1) order the debtor to give security for his appearance (j), (2) order the attachment of his property by actual seizure, and (3) order a warrant to issue for his arrest. The Court may make any of these orders either of its own motion or on the application of any creditor. Any of these orders may be made at any time between the making of the order admitting the petition and the order of adjudication. The object is to secure the debtor's property for the benefit of the general body of creditors in the event of adjudication and to secure the attendance of the debtor to obtain information from him as to his property. To seize the property of the debtor the Court may appoint an interim receiver under sec. 20 of the Act. If a Receiver is eventually appointed under sec. 56, the Court will remove the interim receiver. The Court must be satisfied before ordering an attachment or arrest that the conditions mentioned in the proviso to the section are complied with (h1).

240. Attachment of debtor's property (s. 21).—In practice orders for the attachment of the debtor's property are more frequent than the other orders mentioned in this section. Property exempted from attachment under sec. 60 of the Code of Civil Procedure, 1908, cannot be attached by the Insolvency Court. None of this property vests in the receiver and none of it is divisible among the creditors [s. 28 (5)]. As to what property is divisible among creditors and what not, see Lecture VIII below, "Insolvent's property." Books of account, though exempted from attachment under sec. 60 of the Code, may be attached by the Insolvency Court. If property is attached under this section as the debtor's property, and it is claimed by a third party, the claim should be treated as one made under O. 21, r. 58, of the Code, and the Court is bound to investigate it. It is open to the claimant to wait until a Receiver is appointed and has taken some action in respect of the property, and then appeal under sec. 68 of the Act, but he is not bound to do so. An attachment under sec. 21 is analogous to an attachment before judgment and the provisions of the Code of Civil Procedure, 1908, apply to such attachment by virtue of the provisions of sec. 5 of the Act (k).

(h1) *Amarsingh v. Imperial Bank* ('29) A. L. 808.

(i) *Durrah v. Fazal Ahmed* ('26) A. L. 360, 93 I.C. 903.

(j) As to the liability of a surety for the appearance of the debtor and as

to forfeiture of security, see decisions under s. 145 of the C. P. C., 1908.

(k) *Hashmat Bibi v. Bhagwan Das* (1914) 36 All. 65, 24 I. C. 752.

**Paras.
241, 242**

241. Duties of debtor (s. 22).—The debtor must on the making of an order admitting the petition produce all books of account, and must at any time thereafter give such inventories of his property and such lists of his creditors and debtors and of his debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or Receiver, execute such instruments, and generally do all such acts and things in relation to his property as may be required by the Court or Receiver, or as may be prescribed.

Exercise of powers under sec. 22.—The power given to the Court under this section to require the debtor to give an inventory of his property and a list of his creditors and debtors may be exercised by the Court even before deciding the question whether the debtor has committed any act of insolvency, though the debtor has denied that he has committed any such act (l).

Penalty for failure to perform duties.—A debtor who wilfully fails to perform the duties imposed on him by sec. 22 is liable to be punished under sec. 69 of the Act.

242. Release of debtor between admission of petition and adjudication (s. 23).—At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary. The Court may at any time order any person who has been released under this section to be re-arrested and re-committed to the custody from which he was released. At the time of making any order under this section, the Court must record in writing its reasons therefor.

Debtor must be under arrest or imprisonment.—Under the Provincial Insolvency Act, 1907, the debtor got automatic protection from arrest upon his adjudication (m). The result was that a dishonest debtor who did not want to pay his debts had only to apply for his adjudication, for if in jail he got his release forthwith under the Act, and he was practically protected from being sent to jail again. To remedy this defect the automatic protection which he got under the Act of 1907 was abolished by the Act of 1920. At the same time provision was made for the protection of honest debtors during insolvency proceedings by enacting a new section, being sec. 31. Under that section the debtor may apply for protection from arrest and imprisonment after an order of adjudication has been made. The section now under consideration provides for release from arrest and imprisonment after the admission of the insolvency petition and before the making of an order of adjudication. Two conditions must be fulfilled

(l) *Darrah v. Fazal Ahmed* ('26) A. L. J. 380, 93 I. C. 903. | (m) Prov. I. A., 1907, s. 16.

Para. 242 before this section can apply, namely :—

- (1) the debtor must be under arrest or imprisonment ; and
- (2) he must be under arrest or imprisonment in execution of the decree of a Court for the payment of money.

The section provides for the release of a debtor who is actually under arrest or imprisonment. A debtor is not entitled to protection under this section *before* he is arrested. The Court has no power under this section to make a protection order *in anticipation of* his arrest pending the hearing and final disposal of his petition for adjudication (n). The question still remains whether it has inherent jurisdiction to make such an order.

Inherent power to grant ad interim protection.— In *Abdul Razak v. Basiruddin Ahmed* (o), a case under the Act of 1907, a debtor's petition for adjudication was dismissed, and the debtor appealed. Pending the appeal one of the creditors applied for a warrant of arrest against the debtor. The debtor applied to the appellate Court for an *ad interim* protection order. The Court held that it had inherent power to make the order under sec. 151 of the Code of Civil Procedure, 1908, read with sec. 47 of the Provincial Insolvency Act, 1907 (now sec. 5), and it made an order protecting the debtor from arrest during the pendency of the appeal. This decision was followed by the Madras High Court in a case under the Provincial Insolvency Act, 1920. In that case a debtor filed his insolvency petition and applied for an *ad interim* protection order before adjudication. The District Court rejected the application. The High Court held that the District Judge had inherent power to grant the application (p). The attention of the Court does not seem to have been drawn to the present section. In another Madras case also under the Act of 1920 the High Court refused to grant an *ad interim* protection order before adjudication on the ground that there was no provision in the Act for making such an order (q). The question whether the Court had inherent jurisdiction was not raised. In a Calcutta case under the Act of 1920, the District Court refused to grant *ad interim* protection to the debtor. On an application for revision under sec. 115 of the Code of Civil Procedure, 1908, the High Court refused to interfere on the ground that the case was not within the scope of that section. The question whether the Court had inherent power to grant *ad interim* protection was left open (r). It is submitted that the Insolvency Court has no inherent power to make an *ad interim* protection order in anticipation of the debtor's arrest pending the hearing of the petition. The Act provides specifically for two cases for the protection of the debtor, being those

(n) *Sinnaswami Chettiar v. Aliji Goundan* (1924) 47 Mad. L. J. 530, 80 I. C. 938, ('24) A.M. 893.
 (o) (1910) 14 C. W. N. 586, 6 I. C. 95.
 (p) *Nallagatti Goundan v. Ramana Goundan* (1924) 47 Mad. L. J. 783, 85 I.C. 677, ('25) A. M. 170.

(q) *Sinnaswami Chettiar v. Aliji Goundan* (1924) 47 Mad. L. J. 530, 80 I.C. 938, ('24) A. M. 893.
 (r) *Jewraj Kharewalla v. Lalbhai Kalaynbhai & Co.* (1926) 30 C.W.N. 834, 96 I.C. 131, ('26) A.C. 1011.

contained in sec. 23 and sec. 31. No doubt, under sec. 5 of the Provincial Insolvency Act, the Insolvency Court has the same powers as a Court exercising original civil jurisdiction, but this does not import into the Act the provisions of sec. 151 of the Code of Civil Procedure, 1908, for sec. 5 expressly provides that those powers are to be exercised "*subject to the provisions of this Act,*" and "the provisions of the Act" relating to protection orders are contained in sec. 31. The Provincial Insolvency Act, it is submitted, is a complete code on the subject, and the Court has no power to make an *ad interim* protection order outside the provisions of the Act.

The decree must be a money-decree passed by a Court.—The Insolvency Court has no power under sec. 23 to release a debtor from arrest unless he has been arrested in execution of a decree of a Court for payment of money. Accordingly a debtor arrested under the orders of the Manager, Encumbered Estates, under the provisions of sec. 10 of the Sind Encumbered Estates Act read with sec. 157 of the Bombay Land Revenue Code, for arrears of rent, cannot be released from arrest under this section, the order of the Manager not being a decree of a Court for the payment of money (s).

Power to release debtor from arrest is discretionary.—The Court has a discretion under sec. 23 to release a debtor from arrest or imprisonment. It is not bound to do so, not even if security is offered as a condition for the release. But whether an order for release is made or not, the Court is required to record its reasons for the order (t).

Arrest in execution of another decree.—It would seem that a debtor, who is released from arrest or imprisonment in execution of a decree for the payment of money, may be arrested again in execution of another such decree. The release does not operate as a general protection order in respect of all decrees.

243. Insolvencies pending under Provincial Insolvency Act, 1907.—Under sec. 16 of the Provincial Insolvency Act, 1907, the debtor was entitled to protection from arrest and imprisonment on the making of an order of adjudication. The immunity from arrest so conferred upon an insolvent was a privilege, and it has not been abrogated by the subsequent enactment of the Provincial Insolvency Act, 1920. A debtor, therefore, who has been adjudged insolvent under the Act of 1907 and who has not obtained his discharge, is not liable to be arrested in execution of a decree passed against him after the Act of 1920 came into force. He can only be arrested under an order of an Insolvency Court in cases where he is liable to be arrested under the Act of 1907 (u).

(s) *Ghanshamdas v. Manager, Encumbered Estates* ('27) A. S. 123, 99 I. C. 930.

(t) *Nand Lal v. Nath Mull Srinivas* (1924) 3 Pat. 543, 83 I. C. 877, ('24) A. P. 559.

(u) *Solayappa v. Shunmugasundaram* (1926) 50 Mad. L. J. 237, 93 I. C. 3, ('26) A. M. 510; *Radhey Shiam v. Hakim Saiyed* ('23) A. O. 36, 72 I. C. 911.

LECTURE VI.

PART I.

EFFECT OF ORDER OF ADJUDICATION.

1. *Vesting of property in Official Assignee or Receiver.*

Para. 244 **244. Official Assignee as guardian of public morality.**—On the making of an order of adjudication the proceedings in insolvency assume a new phase. Until adjudication the proceedings are between the debtor and the petitioning creditor. The Court is not called upon in those proceedings to decide questions other than those arising between the debtor and the petitioning creditor. On the making of an order of adjudication the State comes on the scene as represented by the Official Assignee. Thenceforth all proceedings come under the control of the Insolvency Court. The Official Assignee is the guardian not only of the interest of the particular creditors of a particular debtor, but also of public morality and the interest which every member of the public has in the observance of commercial morality. This guardianship the Official Assignee exercises under the control of the Court and of the Government (a). In *Re A Debtor* (b), a debtor, after a receiving order had been made against him, applied for an order staying advertisements and all proceedings under the receiving order (c). The application was made with the consent of the petitioning creditor and the majority of the other creditors. The Registrar made the order but the order was set aside on appeal. In the course of the judgment, Collins, L.J., said: "Now, is it right that a gentleman with these antecedents—an undischarged bankrupt against whom fourteen or fifteen petitions have been filed within the last two years—should on the basis of his credit be allowed to raise this money? I have it on his own affidavit that the object of this stay is to enable him to carry through this great adventure which he says cannot be carried through without his assistance; and that, if he carries it through, he will be put in a position not only of being able to pay his creditors, but of having a large surplus. But the whole of that fabric will fall to the ground if only the public know the true facts about him. Then why should those persons to whom is intrusted by law the guardianship, not only of the interests of the particular creditors of the particular debtor, but of public morality and the interests that every member of the public has in the observance of commercial morality, stand by and allow the debtor to go on trading? Why should the public

(a) *Re Meghraj Gangabux* (1910) 35 Bom. 47, 48, 7 I. C. 448. | (c) See Bankruptcy Act, 1914, s. 113; P.-t. I. A., s. 94.
 (b) (1901) 84 L.T. 666.

by their officer, the Official Receiver, stand by and assist in what I must say appears to me, with the greatest possible deference to the learned Registrar, a public scandal being continued under the apparent sanction of the officer of the Government? Now, then, what is the scheme of the Bankruptcy Act, 1883? It is quite obvious that in the Act now in existence, whatever it may have been in earlier times, the cardinal point is that all these proceedings, from the beginning to the end, shall be kept under the eye of the Government—under the eye of the public authority. There are provisions that everything is done under the sanction of the Board of Trade. Provisions are introduced into the Act to give them complete knowledge of every important step in the proceedings, with the right of intervening in the public interest. It has been laid down over and over again in cases—I do not care whether on this point or the particular point or stage at which the question arises in these proceedings—that there is another and a larger interest to be safeguarded in bankruptcy proceedings than the interest of the particular creditors in each particular case. And even where the scheme suggested or the method which they are invited to adopt might lead to the payment in full of the creditors, and they are all prepared to assent to it, still there is another and higher interest at stake—the interest of the public—of which the Official Receiver under the control of the Board of Trade is the guardian.” In another case where the application was for the rescission of a receiving order, Lord Esher, M.R., said: “Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The Court has gone still further, and I think rightly so, and has said that under the present Bankruptcy Act it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger” (d). In a third case where the application was for the annulment of an adjudication order, Cave, J., said: “A judge of a county court (or of this Court for that matter) is not at liberty to annul an adjudication upon any grounds that may commend themselves for the time being to his judgment, and the Court under this present Act is bound to have regard not only to the wishes of the creditors and not only to the wishes of the debtor but also to the interests of society and the requirements of commercial morality” (e). These principles apply equally in India.

**Paras.
244, 245**

245. Vesting of property in Official Assignee under the Presidency-towns Insolvency Act (s. 17).—When an order of adjudication

(d) *Re Hester* (1889) 22 Q.B.D. 632, 223.
639; *Re Flatau* (1893) 2 Q.B. 219, (e) *Re Gyll* (1889) 59 L. T. 778, 779..

Para. 245 is made the property of the insolvent *wherever situate* vests in the Official Assignee and becomes divisible among his creditors. The property of the insolvent which vests in the Official Assignee may be movable or immovable. It may be situate in British India, or in the British Empire outside British India, or in a foreign country.

Property in British India.—The order of adjudication operates as a statutory transfer to the Official Assignee of all the property of the insolvent in British India whether movable or immovable (f).

Movables outside British India.—The movable property of the bankrupt, wherever situate, passes to the Official Assignee. The reason is that movable property is governed by the law of the country which governs the person of the owner (g). It is different as to immovable property, for the title to such property is governed by the *lex loci rei sitae*, that is the law of the country in which the property is situated. Title to such property can only be acquired if the property is conveyed by the owner in the manner required by the law of the country where it is situated.

Immovable property outside British India.—Immovable property outside British India may be either in the British Empire* outside British India or it may be in a foreign country. Under the Indian Insolvency Act, 1848, the property of the insolvent, *wherever situate*, vested in the Official Assignee. That Act was an Imperial Act and it operated throughout the British Empire. The result was that a vesting order made under that Act operated as a statutory transfer of immovable property of the insolvent situated anywhere in the British Empire (h), but it did not operate as a statutory transfer of immovable property in a foreign country. Even in the case of immovable property in the British Empire outside British India the property vested in the Official Assignee subject to any requirements prescribed by the local law as to the conditions necessary to effect a transfer of immovable property situate in the locality (i). Thus if registration was necessary to pass the title the Official Assignee could get no title without registration (j).

(f) *Official Assignee, Bombay v. Registrar, Small Cause Court, Amritsar* (1910) 37 I.A. 86, 37 Cal. 418, 6 I. C. 273 [property situate in the Punjab held to vest in the Official Assignee of Bombay]; *Re Ganeshdas Panatal* (1908) 32 Bom. 198 [ditto]; *Re Jewandas Jhavar* (1913) 40 Cal. 78, 18 I. C. 908 [property situate in Delhi held to vest in the Official Assignee of Bengal].
(g) *Cockerell v. Dickens* (1840) 2 M.I. A. 355, 386, 18 E.R. 334, 346; *Re Anderson* (1911) 1 K.B. 896;

Yokohama Specie Bank v. S. Curlender & Co. (1926) 43 Cal. L. J. 436, 96 I. C. 459, (26) A. C. 898; *Re Naoroji Sorabji Talati* (1909) 33 Bom. 462, 467, 3 I. C. 987.
(h) *Re Naoroji Sorabji Talati* (1909) 33 Bom. 462, 3 I. C. 987 [property situate in Shanghai held to vest in the Official Assignee of Bombay].
(i) *Callender Sykes & Co. v. Colonial Secretary* (1891) A.C. 400.
(j) *Ex parte Rogers* (1881) 16 Ch. D. 665, at p. 666.

The Presidency-towns Insolvency Act is an Act of the *Indian Legislature*, and though under it the property of the insolvent *wherever situate* vests in the Official Assignee, an order of adjudication made under that Act can operate as a statutory transfer only of property situated in British India. The Act "operates wherever, but not elsewhere, that Legislature could give the law" (k); therefore, an order of adjudication under that Act cannot operate as a statutory transfer of immovable property outside British India, not even of immovable property situated in the British Empire outside British India. As, however, all property outside British India vests in the Official Assignee by virtue of the order of adjudication, the Courts of *this country* will treat the property of the insolvent situated outside British India, whether situated in the British Empire or in a foreign country, as the property, not of the insolvent, but of the Official Assignee, and they can compel the insolvent to transfer such property to the Official Assignee in the manner required by the law of the place where the property is situated. The insolvent is bound, under sec. 33 (2) (d) of the Presidency-towns Insolvency Act, to execute such transfers as he may be required by the Court to do, and if he fails to do so he may be punished for contempt of Court under sec. 33 (4). As to property situated in the British Empire outside British India, a Court exercising jurisdiction under the Presidency-towns Insolvency Act may make an order seeking aid, with a request to any Bankruptcy Court in any country in the British Empire to act in its aid, and the Court to which the request is made will thereupon act in aid of the requesting Court and take action on the application of the Official Assignee to enable him to realise the insolvent's property in that country. See paras. 80 and 81 above

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245-247

246. Successive insolvencies in different Courts.—Where there are successive adjudications in insolvency by different Courts, all the property of the insolvent vests in the Official Assignee appointed by the Court in which the prior adjudication was made and he will not be divested of it by the subsequent adjudication of the other Court, even if the later adjudication be based on acts of insolvency committed earlier in date than those upon which the prior adjudication was made (l).

247. Special manager (s. 19).—If in any case the Court, having regard to the nature of the debtor's estate or business or to the interests of the creditors generally, is of opinion that a special manager of the estate or business ought to be appointed to assist the Official Assignee, the Court may appoint a manager thereof accordingly to act for such time as the Court may authorize, and to have such powers of the Official Assignee as may be entrusted to him by the Official Assignee or as the Court may direct. The special manager must give security and furnish accounts in such manner as

(k) *Cockrell v. Dickens* (1840) 2 M. I. A. 353, 387, 18 E. R. 334.

(l) *Official Assignee of Madras v.*

Official Assignee of Rangoon (1919) 42 Mad. 121, 49 I. C. 210.

Paras.
247-249

the Court may direct, and will receive such remuneration as the Court may determine.

Special manager when appointed.—The appointment of a special manager is in the discretion of the Court. The appointment can only be made after the making of an order of adjudication. The object of the appointment is to assist the Official Assignee in the management of the estate or business of the insolvent. The insolvent is bound to attend on the special manager at such times and places as may be required by him (m).

248. Vesting of property in Receiver under the Provincial Insolvency Act [s. 28 (2)].—On the making of an order of adjudication, the whole of the property of the insolvent in British India (n) vests in the Court or in a Receiver who may be appointed by the Court at the time of the order of adjudication or at any time after it. Until a Receiver is appointed the Court has all the rights of, and may exercise all the powers conferred on, a Receiver under the Provincial Insolvency Act. The vesting of the property is not suspended until the actual appointment of a Receiver. If the insolvent acquires any property after the date of adjudication or any property devolves on him after that date, the property, if a Receiver is appointed, vests in him as from the date of acquisition or devolution, whatever the date of the Receiver's actual appointment may be (o).

The Local Government has power under sec. 57 of the Provincial Insolvency Act to appoint such persons as it thinks fit (to be called "Official Receivers") to be Receivers under the Act within such local limits as it may prescribe. Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under the Act, he will be the receiver for the purpose of every order appointing a Receiver or an interim receiver made by any such Court, unless the Court for special reasons otherwise directs. The property of the insolvent, however, does not vest in the Official Receiver on the making of the order of adjudication; it vests in him only when he is appointed a Receiver of the insolvent's property under sec. 56 (1).

2. *Bar of suits and other proceedings in certain cases.*

249. Leave to sue when necessary [P.-t. I. A., s. 17; Prov. I. A., s. 28 (2) & (6)].—Another effect of the order of adjudication is to bar the institution of certain suits and proceedings without the leave of the Insolvency Court. The provisions of both the Acts are

(m) P.-t. I. A., s. 33 (2).

(n) See *Cockrell v. Dickens* (1840) 2 M.I. A. 355, 18 E.R. 334.

(o) *Kala Chand Banerjee v. Jagannath*

Marwari (1927) 54 I. A. 190, 54 Cal. 595, 101 I. C. 442, ('27) A. PC. 108; *Ralla Ram v. Ram Labhaya* (1924) 6 Lah. L. J. 232, 80 I. C. 509, ('25) A. L. 158.

in this respect identical, and they may be dealt with together. They are contained in sec. 17 of the Presidency-towns Insolvency Act, and sec. 28 (2) and (6) of the Provincial Insolvency Act and they are referred to in this part of the Lecture as "this section."

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249, 250**

This section provides that after an order of adjudication, except as provided by the Act, (ol), no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose; *provided* that this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

It is clear from this section that leave to sue is necessary where—

- (1) the suit is for a "debt";
- (2) the debt is "provable in insolvency"; and
- (3) the suit is commenced "during the pendency of the insolvency proceedings."

After an order of adjudication is made, the property of the insolvent vests in the Official Assignee or Receiver, and it has to be administered in the manner prescribed by the insolvency law. The insolvency law prescribes the mode in which creditors have to prove their claims (p). They must therefore proceed to realise their claims in the manner prescribed by that law. This section, it will be observed, bars suits in respect only of debts *provable* in insolvency (q); debts not provable in insolvency are outside the scope of this section. As regards secured creditors, they "stand outside the insolvency," and their right to realise or otherwise deal with their security is unaffected by the presentation of an insolvency petition or by the making of an order of adjudication (r).

250. Leave must be obtained before institution of suit.—This section says that no creditor shall, after adjudication, commence any suit in respect of any debt provable in insolvency except with the leave of the Court in which insolvency proceedings are pending. Such leave is a condition precedent to the institution of the suit, and it should be obtained before the institution of the suit. It cannot be granted after the institution of the suit, not even if the suit was brought in ignorance of the order of

(ol) The reference is to provisions as to proof of debts and distribution of assets *pro rata* amongst the creditors.

(p) See P.-t. I. A., s. 48, and Sch. II, and Prov. I. A., ss. 33-49.

(q) As to what debts are provable in insolvency, see P.-t. I. A., s. 48 and Prov. I. A., s. 34.

(r) *Re Gordon* (1871) L. R. 6 Ch. App. 555, 557.

Para. 250 adjudication (s). A suit instituted after adjudication but without leave is not maintainable even if the order of adjudication is annulled after the institution of the suit (t). In a recent Madras case (u) Wallace, J., after reviewing the authorities on the subject, said; "No doubt, as was recognized, this may work hardship in certain cases for example, where the plaintiff is ignorant of the insolvency proceedings altogether. But after all, the Gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On the other hand, unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and the Insolvency Court. All the creditors could file suits without leave and maintain that the Court should keep these pending until the insolvency proceedings had come to an end on the ground that the initial bar would then be removed. That would be practically overriding sec. 28 [of the Provincial Insolvency Act]. The insolvent is entitled to the protection of the Court against the commencement of any such suit." The leave to sue may be granted *ex parte* (v).

It is necessary at this stage to consider the provisions of sec. 18 (3) of the Presidency-towns Insolvency Act corresponding to sec. 29 of the Provincial Insolvency Act. Both these sections relate to stay of suits. They empower the Court in which a suit is pending against the insolvent, as distinguished from the Insolvency Court which made the order of adjudication, to stay the suit or to continue it on such terms as it may impose, on proof that an order of adjudication has been made against the insolvent. In a Bombay case (w), a suit was filed after adjudication, but without the leave of the Insolvency Court. After a few days the plaintiff applied for leave to sue under this section and it was granted *ex parte*. The insolvent then applied for a stay of the suit under sec. 18 (3) of the Presidency-towns Insolvency Act and stay was granted. No point was made that the Court had no power to grant leave after the institution of the suit and that the order granting leave was made without jurisdiction. All that was contended was that sec. 18 (3) applied only to suits pending when the order of adjudication was made and not to suits instituted after adjudication. This contention was overruled and it was held on the authority of *Brownscombe v. Fair* (x)

(s) *Re Dwarkadas Tejchandras* (1916) 40 Bom. 235, 31 I.C. 94r; *Rowe & Co., Ltd. v. Tan Thean Taik* (1924) 2 Rang. 643, 84 I. C. 909, ('25) A.R. 105; *Ghouse Khan v. Bala Subba Rowther* (1928) 51 Mad. 833, 105 I. C. 109, ('27) A. M. 925; *Ponnusami v. Kaliaperumal* ('29) A.M. 480, 113 I.C. 550; *Panna Lal Tassadag Hussain v. Hira Nand Jiwan Ram* (1927) 8 Lah. 593, 102 I.C. 37, ('28) A. L. 28.

(t) *Ponnusami v. Kaliaperumal* ('29) A. M. 480, 113 I. C. 550.

(u) *Ponnusami v. Kaliaperumal* ('29) A.M. 480, 113 I. C. 550.

(v) *A. K. R. M. M.C.T. Chettyar v. S. E. Munnee* (1928) 6 Rang. 533, ('28) A.R. 326.

(w) *Mahomed Haji Issack v. Abdul Rahiman* (1917) 41 Bom. 312, 33 I.C. 694.

(x) (1887) 58 L. T. 85.

that the words of sec. 18 (3) were wide enough to justify a stay of a suit even though it was instituted after adjudication. As to this decision it may be observed that if leave is a condition precedent to the *commencing* of a suit, no leave can be granted after the institution of a suit. This decision was followed with hesitation by Fawcett, J., in a later Bombay case (y). Para. 250

In a Madras case (z) the plaintiff instituted a suit against the insolvent without the leave of the Court. The plaintiff was not aware when he brought the suit that the defendant had been adjudged insolvent. When the plaintiff came to know of it he applied to the Insolvency Court for leave. The application was refused on the ground that the suit was initially bad, but the Court expressed the opinion that the proper remedy of the plaintiff was to apply to the Court in which the suit was instituted for leave to continue the suit under sec. 29 of the Provincial Insolvency Act. This view is obviously untenable, for if a suit is bad in its inception the Court has no power either to stay it or to allow it to continue. The only course open to the Court is to dismiss it. In a recent Lahore case (a), where also the suit was brought in ignorance of the order of adjudication, it was held that no stay can be granted under sec. 29 of the Provincial Insolvency Act as that section applied only to suits pending at the date of the order of adjudication.

In *Brownscombe v. Fair* (b) referred to above, the action was brought after a receiving order was made, but no leave of the Court was obtained. The defendant applied for a stay of the suit and the action was stayed. Both in the argument at the bar and in the judgment two sections of the Bankruptcy Act, 1883, were referred to. One of them was sec. 9 which corresponds to sec. 17 of the Presidency-towns Insolvency Act and provides that no action shall be commenced after a receiving order is made without the leave of the Insolvency Court (c). The other was sec. 10 which corresponds to sec. 18 (3) of the Presidency-towns Insolvency Act. That section provides that at any time after the presentation of a bankruptcy petition, "any Court in which proceedings are pending against the debtor may either stay the proceedings or allow them to continue on such terms as it may think just" (d). It was not even argued in the case that the action was not maintainable in the absence of leave. Referring to sec. 10, Wills, J., said: "The intention of the Legislature in the Bankruptcy Act was, that on the bankruptcy of a man no more litigation between the bankrupt and his creditors should be permitted except in special circumstances such as where a case was at the time of the bankruptcy ripe for trial, in which the amount of the proof against the

(y) *Bheraj Samarthji & Co. v. Vasant Rao Govindrao Prabhakar* (1929) 31 Bom. L.R. 981, ('29) A. B. 398.

(z) *Ghouse Khan v. Bala Subba Rowther* (1928) 51 Mad. 833, 105 I.C. 109, ('27) A.M. 925.

(a) *Panna Lal Tassaduq Hussain v.*

Hira Nand Jiwan Ram (1927) 8 Lah. 593, 95 I.C. 549, ('27) A. L. 28.

(b) (1887) 58 L.T. 85.

(c) Now B.A., 1914, s. 7.

(d) Now B.A., 1914, s. 9.

**Paras.
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bankrupt's estate would not be seriously affected. But there must be some such circumstance ; in the present case there is nothing exceptional. Mr. Rose-Innes says that the jurisdiction of the Court is limited to actions commenced before bankruptcy proceedings are initiated ; but I do not think so, for the words are perfectly general." In *Blount v. Whitely* (e), where also no leave was obtained, the action was stayed, but it was done under sec. 9 of the Bankruptcy Act, 1883. *Brownscombe v. Fair* is cited in Williams, Bankruptcy Practice (f) under sec. 7 of the Bankruptcy Act, 1914, which corresponds to sec. 9 of the Bankruptcy Act, 1883. As to these cases it is stated in Halsbury's Laws of England (g), that the practice is to stay such actions under sec. 9 of the Bankruptcy Act, 1883, being the section which says that no action can be commenced after a receiving order has been made without the leave of the Bankruptcy Court.

The real question seems to be whether the absence of leave required by the section is only a bar to the Court's dealing with the suit or whether it is a bar to the original institution of the suit (h). The language of the section shows that the absence of leave is a bar to the original institution of a suit. If so, the only course left open to the Court where a suit is instituted without leave, is to dismiss it. The Court has no power either to stay the suit or to allow it to continue on terms.

It is not competent to a creditor, who has obtained an order of adjudication, to abandon it so as to enable himself to institute a suit against the insolvent. The reason is that the order is not exclusively for his benefit, but for the benefit of the whole body of creditors (i).

251. During the pendency of insolvency proceedings.—This section says that no suit shall be commenced during the pendency of the insolvency proceedings. The refusal of the discharge of an insolvent does not terminate the insolvency proceedings. A suit, therefore, commenced by a creditor against an insolvent though it be commenced after such refusal, is a suit instituted during the pendency of the insolvency proceedings, and leave to sue must be obtained (j). The same remarks apply to proceedings in execution (k).

252. Leave to sue does not imply leave to execute.—Leave granted under this section to institute a suit does not necessarily include

(e) (1899) 6 Mans. 48.

(f) 13th ed., p. 87.

(g) Vol. 2, p. 63, f.n. (b).

(h) See *Rendall v. Blair* (1890) 45 Ch. D. 139, at p. 158, per Bowen, L.J.

(i) *Blount v. Whitely* (1899) 6 Mans. 48, (1899) 79 L. T. 635.

(j) *Roue & Co. v. Tan Thein Teik* (1924) 2 Rang. 643, 84 I. C. 909, ('25)

A. R. 105 ; *Tan Seik Ke v. C.A.M.C.T. Firm* (1928) 6 Rang. 27, 109 I. C. 769, ('28) A. R. 109, dissenting from *Maung Po Toke v. Maung Po Gyi* (1925) 3 Rang. 492, 92, I. C. 142, ('26) A. R. 2.

(k) *Alamelu Ammal v. Venkatarama Iyer* (1927) 50 Mad. 977, 105 I. C. 165, ('27) A. M. 919.

leave to execute the decree which may be obtained in the suit by attachment and sale of the debtor's property (l).

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253. Leave when not necessary.—This section deals only with suits against an insolvent. It has nothing to do with suits against the Official Assignee or Receiver which are governed by different considerations altogether. They are dealt with separately in Lecture XII.

Leave under this section is necessary only in the case of a suit or other legal proceeding by a creditor against the insolvent in respect of a debt provable in insolvency. It is not necessary in any other case. The "other legal proceeding" referred to in the section must be a civil proceeding. Thus no leave is necessary to file a criminal complaint against an insolvent for an offence alleged to have been committed by him, as, for instance, dishonest concealment of property with intent to prevent the distribution thereof amongst his creditors, which is an offence punishable under sec. 421 of the Indian Penal Code (m). The suit or other legal proceeding must be one to recover a "debt." A suit by a tenant of the insolvent against the Official Assignee or Receiver to set aside a distraint by the latter on the ground that no rent was due when the distraint was made is not a suit to recover a "debt," and no leave is necessary to institute the suit (n). The debt must be one "provable in insolvency" (o). A debt contracted by an insolvent after the date of the order of adjudication is not a debt provable in insolvency (p). An occupancy holding to which the Agra Tenancy Act, 1901, applies is outside the provisions of both the Insolvency Acts. No leave, therefore, is necessary for a suit for arrears of rent by a zamindar against his tenant though the tenant has been adjudged insolvent (q). If the zamindar obtains a decree in the suit, he may execute it without the leave of the Court. The Insolvency Acts not applying to such a proceeding, the decree is not a "debt provable in insolvency" (r). Similarly, unliquidated damages in tort do not constitute a "debt provable in insolvency" and no leave to sue is necessary in respect of such a claim. A debt not provable in insolvency is not affected by an order of discharge (s). A suit under O. 21, r. 63, of the Code of Civil Procedure, 1908, by an attaching creditor against the claimant and the insolvent for a declaration that the property attached belongs to the insolvent is not within this section, and no leave to sue is necessary (s1).

(l) *Bijai Inder Singh v. Charan Singh* (1926) 24 All. L.J. 755, 98 I. C. 525, ('26) A. A. 640.

(m) *Emperor v. Mulshankar* (1911) 35 Bom. 63, 7 I. C. 963. See also *Re Rewry* (1887) 36 Ch. D. 138 (attachment for contempt of Court).

(n) *Ramalinga v. Anantachariar* (1913) 24 Mad. L.J. 350, 18 I. C. 722. The suit not being against the insolvent, no question of leave can arise under this section.

(o) As to debts provable in insolvency, see P.-t. I. A., s. 46; Prov. I. A., s. 34.

(p) *Bijai Inder Singh v. Charan Singh*

(1926) 24 All. L. J. 755, 756, 98 I. C. 525, ('26) A. A. 640; *Hiralal v. Tulsiram* ('25) A. N. 77.

(q) *Kalka Das v. Gajju Singh* (1921) 43 All. 510, 62 I. C. 897, ('21) A. A. 13.

(r) *Parbati v. Raja Shiam Rikh* (1922) 44 All. 296, 299, 66 I. C. 214, ('22) A. A. 74.

(s) See P.-t. I. A., s. 45 (2); Prov. I. A., s. 44 (2). See *Thakorain Sri Ram v. Babu Ram* (1929) 4 Luck. 241, 113 I. C. 86, ('29) A. O. 71.

(s1) *Subramanyam v. Narasymham* (1929) 56 Mad. L.J. 489, 119 I. C. 46, ('29) A. M. 323.

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254. Suits commenced before adjudication order.—This section has no reference to suits or other proceedings actually pending against the debtor at the date of the order of adjudication. No leave therefore is necessary to *continue* a suit commenced before the order of adjudication (*t*). It has accordingly been held by the High Court of Lahore that where a suit is filed by a mortgagee before the order of adjudication, and the mortgaged property is sold in execution of the decree, the Court may pass a *personal* decree against the insolvent mortgagor under O. 34, r. 6, of the Code of Civil Procedure, 1908, for the deficiency. In the view of that Court a decree under O. 34, r. 6, is not a “remedy” against the property of the insolvent within the meaning of this section (*u*). On the other hand, it has been held by the High Court of Allahabad that such a decree is a “remedy” against the property of the insolvent within the meaning of this section and that no personal decree can be passed against the mortgagor after an order of adjudication (*v*). The Lahore decision, it is submitted, is correct. An application under O. 34, r. 6, is not a new proceeding, but a continuation of the original suit, and the suit having been instituted before the adjudication, it may be continued without any leave under this section.

255. Execution against insolvent's property.—This section applies not only to suits, but also to any “other legal proceeding” against the debtor. The expression “other legal proceeding” includes a proceeding in execution (*w*). No execution therefore can be commenced against the property of the insolvent after an order of adjudication without the leave of the Insolvency Court. This rule does not apply to the case of a debtor who has been adjudged insolvent by a foreign Court, *e. g.*, the Court at Secundrabad (*w1*).

In *Raghunath Das v. Sunder Das* (*x*), the property of the judgment-debtor was attached in execution of a decree against him. Afterwards the judgment-debtor was adjudged insolvent under the Indian Insolvency Act, 1848, and his property vested in the Official Assignee. No notice under O. 21, r. 22, of the Code of Civil Procedure, 1908, was served on the Official Assignee. The property was then sold in execution of the decree and it was held by the Privy Council that the sale was void as against the Official Assignee and that the auction-purchaser acquired no title to the property. It was also held

(*t*) *Re Wray* (1887) 36 Ch. D. 138, 143; *Re Berry* (1896) 1 Ch. 939, 946.

(*u*) *Kishan Chand v. Sohan Lal* (1921) 2 Lah. 95, 59 I.C. 710, (21) A.L. 270.

(*v*) *Mamraj v. Brij Lal* (1912) 34 All. 106, 12 I. C. 587.

(*w*) See *Kalka Das v. Gajju Singh* (1921) 43 All. 510, 62 I.C. 897, (21) A.A. 13, Prov. I. A., s. 78. See also *Sarat Chandra Pal v. Barlow & Co.* (1928), 56 Cal. 712, 720, (28) A.C. 782 (F.B.) a case under s. 18 (1) of the P.-t. I. A., where it was held that the expression “other proceeding” in that section refers to proceedings in the nature of suits, execution or other legal process.

(*w1*) *Venkanna v. Chennaya* (1929) 57 Mad. L. J. 393, (29) A. M. 900.

(*x*) (1914) 41 I.A. 251, 256, 257, 42 Cal. 72, 82, 83, 24 I.C. 304. In cases under the Insolvency Chapter (Chapter XX) of the Code of Civil Procedure, 1882, the property of the insolvent vested in a receiver. Under that Chapter it was held that a sale of the property of the insolvent after the property had vested in the receiver was void and that the purchaser acquired no title to the property: *Gauri Datt v. Shankar Lal* (1892) 14 All. 358; *Viraraghava v. Parasurama* (1892) 15 Mad. 372.

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that a notice under O. 21, r. 22, of the Code was a condition precedent to the validity of subsequent execution proceedings and that no such notice having been issued and served upon the Official Assignee, the sale was a nullity. In the course of the judgment their Lordships said: "Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the Official Assignee it was wrong to allow the sale to proceed at all. The judgment creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him [under O. 21, r. 22], and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property." That was a case under the Indian Insolvency Act, 1848, but the principle of the decision was followed in cases under the Provincial Insolvency Act, 1907, and it has been held that an attachment or sale of the insolvent's property after adjudication is void as against the Receiver (y). No leave of the Insolvency Court to execute the decree was obtained in those cases (z), nor was any notice issued or served upon the Receiver as required by O. 21, r. 22, of the Code.

The Provincial Insolvency Act, 1907, contained a section, being sec. 34 (3), by which it was enacted that "a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver." This provision is reproduced in sec. 51 (3) of the Provincial Insolvency Act, 1920, and sec. 53 (3) of the Presidency-towns Insolvency Act. There was no such provision in the Indian Insolvency Act. It is a reproduction of the latter part of sec. 46 (3) of the Bankruptcy Act, 1883, now Bankruptcy Act, 1914, sec. 40 (3). That section provides that "an execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy". It would seem that the section of the Indian Acts is wider than the section of the English Act in that it includes sales in execution effected even after the date of the order of adjudication. It is not clear whether the Indian section is to be read subject to the ruling of the Privy Council in *Raghunath Das v. Soon-ler Das*: that a sale in execution made without notice to the Official Assignee or Receiver as required by O. 21, r. 22, of the Code, is a nullity. If it is to be so read, a sale made after adjudication, but without notice to the Official Assignee or Receiver as required by O. 21, r. 22, would be a nullity, and a person who purchases the property even in good faith and

(y) *Dambar Singh v. Munawar Ali Khan* (1918) 40 All. 86, 43 I. C. 129; *Gobind Das v. Karan Singh* (1918) 40 All. 197, 43 I. C. 672; *Anantharama Iyer v. Kuttimalu Kovilamma* (1916) 30 Mad. L. J

611, 34 I. C. 829; *Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (1921) 44 Mad. 524, 62 I. C. 495, (21) A.M. 204.
(z) See Prov. I. A., 1907, s. 16.

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without notice of the insolvency cannot acquire a good title to the property as against the Official Assignee or Receiver. If it is not to be so read, a person who purchases the property in good faith and without notice of the insolvency will acquire a good title to the property as against the Official Assignee or Receiver even if no notice under O. 21, r. 22, is given to the Official Assignee or Receiver. To so hold would be to say that the provisions of O. 21, r. 22, do not apply where the property of the judgment-debtor passes on his insolvency to the Official Assignee or Receiver, a result which could not have been intended by the Legislature. It has been held in a Madras case that a person purchasing property at a sale in execution in good faith after an order of adjudication acquired a good title to it against the Receiver (21). No question was raised in that case as to notice under O. 21, r. 22, of the Code.

256. Execution against person of insolvent.—The High Court of Madras has held that the expression “other legal proceeding” in sec. 17 of the Presidency-towns Insolvency Act [Provincial Insolvency Act, sec. 28 (2)] includes a proceeding in execution against the person of the insolvent, and that no such proceeding can be commenced against the insolvent after the making of the order of adjudication without the leave of the Insolvency Court. Where, therefore, a warrant was issued for the arrest of the debtor by the Small Cause Court of Madras in execution of a decree passed by that Court, after the debtor was adjudged insolvent by the High Court of Madras, without the leave of the High Court, it was held that the proceedings in execution were void (a). The same view has been taken by the High Court of Rangoon (b), and Lahore (c). The practice obtaining in Bombay is, however, different. In the view taken by the Bombay Court no leave is necessary to commence an execution against the person of the insolvent. The Bombay view proceeds on the ground that this section only bars the creditor’s remedy against the property of the insolvent and not against his person. The section does not say “no creditor shall have any remedy against *the property or person* of the insolvent”; what it says is that “no creditor shall have any remedy against *the property* of the insolvent.” The words “other legal proceeding” must therefore refer to execution against the property of the insolvent and not against his person. The Bombay High

(21) *Ramanatha v. Vijayaraghavalu* (1927) 106 I.C. 34, ('27) A.M. 983.

(a) *Easwara Iyer v. Govindarajulu* (1916) 39 Mad. 689, 31 I.C. 192; *Alamelu Ammal v. Venkatarama Iyer* (1927) 50 Mad. 977, 105 I.C. 165, ('27) A.M. 919.

(b) *M. V. A. L. Viswanathan v. Abdul Majid* (1925) 3 Rang. 187, 191, 8 I.C. 381, ('25) A.R. 305 [P.-t. I.A.]; *Maung Po Toke v. Maung Po Gyi* (1925) 3 Rang.

492, 92 I.C. 142, ('26) A.R. 2 [Prov. I.A.], dissented from on another point in *Tan Seik Ke v. C. A. M. C. T. Firm* (1928) 6 Rang. 27, 109 I.C. 76, ('28) A.R. 109; *Thakurdeen v. J. Dubay* (1920) 55 I.C. 250.

(c) *Firm Parbati Singh v. Firm Bhai Mewa Singh* ('28) A.L. 258, 107 I.C. 608. See also *Haveli Ram v. Zamindara Bank* ('29) A.L. 453, 454, 117 I.C. 373.

Court also maintains that the latter part of the section which begins with the words "or shall commence any suit or other proceeding except with the leave of the Court," must be read with the preceding part, otherwise leave would also be necessary for the institution of suits other than those for the recovery of provable debts. The question is not free from doubt, and the sooner the conflict of decisions is put an end to, the better. In the meantime an historical review of the legislation on the subject may not be out of place. Para. 256

By sec. 341 of the Code of Civil Procedure, 1882, it was provided that "the judgment-debtor *shall be discharged from jail* if he be declared an insolvent as hereinafter provided." Sec. 9 of the Bankruptcy Act, 1883, was in these terms: "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as provided by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy, shall have any remedy against *the property or person* of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose." Sec. 16 of the Provincial Insolvency Act, 1907, was in the following terms: "On the making of an order of adjudication *the insolvent, if in prison for debt, shall be released* ; and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act, shall, during the pendency of the insolvency proceedings, have any remedy against *the property or person* of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose." It will be observed that the words "the insolvent, if in prison for debt, shall be released" in sec. 16 are taken from sec. 341 of the Code of Civil Procedure, 1882, and the rest of the section is taken from sec. 9 of the Bankruptcy Act, 1883. Next came the Presidency-towns Insolvency Act, 1909. The legislature had before it the model of sec. 16 of the Provincial Insolvency Act, 1907, but it did not wholly adopt it. A very substantial change was made, and the words of sec. 16 of the Provincial Insolvency Act, 1907, namely, "the insolvent, if in prison for debt, shall be released," and the words "or person" were omitted (d). Sec. 17 of the Presidency-towns Insolvency Act corresponds with sec. 16 of the Provincial Insolvency Act, 1907, except that the words mentioned above have been omitted.

(d) Cl. 16 of the P.-t. I. Bill (now sec. 17 of the Act), as originally drafted, was in the same terms as sec. 16 of the Prov. I. A., 1907. The Bill was circulated, and there was an overwhelming body of opinion in favour of omitting the words "the insolvent, if imprisoned for debt,

shall be released," and the words "or person", on the ground that if those words were retained it would give undue protection to dishonest debtors. Those words were accordingly omitted and the clause was drafted in the form in which sec. 17 now stands.

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Next in order came the Provincial Insolvency Act, 1920, which repealed the Act of 1907. The words of sec. 16 set out above were omitted in sec. 22 (2) of the Act of 1920 as was done in the case of sec. 17 of the Presidency-towns Insolvency Act. The omission of those words in sec. 22 (2) of the Act of 1920 has a far reaching effect. Under sec. 16 the debtor received automatic protection from arrest and imprisonment upon adjudication. If he was in jail when the order of adjudication was made, he was entitled to be released from it. Also since all remedy against the *person* of the debtor was barred he enjoyed complete immunity from arrest and imprisonment during the pendency of the insolvency proceedings. "The immunity from arrest which an adjudication under the Act of 1907 conferred was certainly regarded as a privilege by the persons concerned, and indeed a highly valued privilege, so much so, that it is notorious that it formed the motive for a large proportion of the applications for adjudication which were filed" (e). This led to the change in the Act of 1920. The protection which sec. 16 afforded was abolished, and two new sections were enacted, being secs. 23 and 31 of the Act of 1920. The order of adjudication no longer operates as an automatic protection of the judgment-debtor from arrest (f), and the debtor has to apply to the Insolvency Court for protection under sec. 31 of the Act.

Even under the Provincial Insolvency Act, 1920, the judgment-debtor is somewhat in a more favourable position than under the Presidency-towns Insolvency Act. After adjudication he may apply for a protection order under sec. 31 of the Provincial Insolvency Act. If he is arrested before adjudication, but after admission of the insolvency petition, he may apply to the Insolvency Court for release from arrest under sec. 23 of the Act. Under the Presidency-towns Insolvency Act, however, no protection is granted as a general rule until after the insolvent has submitted his schedule. The only case in which a protection order can be made before the submission of the schedule is where the Court thinks it necessary to do so in the interests of the creditors; but this can be done only after an order of adjudication has been made (f). There is no provision in the Presidency-towns Insolvency Act for any protection before adjudication.

257. Limitation.—A debt which is barred by the law of limitation at the date of the order of adjudication is not provable in insolvency, but if the debt was not so barred, lapse of time will not deprive the creditor of

(e) *Radhey Shyam v. Hakim Saiyed* (1923) 72 I. C. 911, 912, ('23) A. O. 30.

(f) *Maharaj Hari Ram v. Sri Krishnan Ram* (1927) 49 All. 201, 100 I. C.

320, ('27) A. A. 418; *Mahomed Roshan v. Gulam Mohideen* (1929) 31 Bom. L.R. 206, ('29) A.B. 136; *Haveli Ram v. Zamindara Bank* ('29) A. L. 453, 117 I. C. 373.

(f1) See P.-t. I. A., sec. 25

his right of proof (g). The Indian Limitation Act, 1908, has no application to proof of debts, and it is open to a creditor who was not barred at the commencement of the insolvency to come in and prove his debt *in insolvency* at any time so long as there are assets available for distribution, even after the discharge of the insolvent, but so as not to disturb any dividend then already declared (h). Para. 257

Suit after annulment of adjudication.—After an adjudication is annulled, the only remedy open to a creditor to enforce his claim is by way of suit. But his claim, though not barred at the date of adjudication, may have become barred by the time when the adjudication is annulled. In cases of this kind the question arose whether the period from the date of the order of adjudication to the date of the order of annulment should be excluded in computing the period of limitation for the suit. It was held that it could not be so excluded, even if the creditor's proof was admitted by the Official Assignee or Receiver, unless there was an acknowledgment in the meantime such as would bring the case within sec. 19 of the Indian Limitation Act, 1908. The same rule was held to apply to applications for execution. The ground of the decisions was that there was no provision in the Indian Limitation Act, 1908, about it, and that in the absence of any such provision the general rule applied, namely, that if the statute once begins to run it continues to run whatever happens. Such was the law under the Provincial Insolvency Act, 1907 (i), and it is still the law in cases governed by the Presidency-towns Insolvency Act (j). The hardship occasioned by these decisions was remedied as regards the provinces by sec. 78 of the Provincial Insolvency Act, 1920. That section provides that where an order of adjudication has been annulled under that Act (k), in computing the period prescribed for any suit or application for the execution of a decree [other than a suit or application in respect of which the leave of the Court was obtained under sec. 28 (2)] which might have been brought or made but for the making of the order of adjudication under that Act, the period from the date of the order of adjudication to the date of the order of annulment is to be excluded: provided that nothing in the section shall apply to a suit

(g) *Ex parte Ross* (1827) 2 Gl. & J. 330; *Re Benzon* (1914) 2 Ch. 68, 75-76; *Sivasubramania v. Theethiappa* (1924) 47 Mad. 120, 75 I.C. 572, ('24) A.M. 163; *Baranashi Koer v. Bhabhadeb* (1921) 34 Cal. L.J. 167, 66 I.C. 758, ('21) A.C. 456; *Jhan Bahadur Singh v. Bailiff of the District Court of Toungoo* (1927) 5 Rang. 384, 104 I.C. 816, ('27) A.R. 263.

(h) *Re McMurdo* (1902) 2 Ch. 684; *Sivasubramania v. Theethiappa* (1924) 47 Mad. 120, 75 I.C. 572, ('24) A.M. 163; *Babu Lal Sahu*

v. Krishna Prasad (1925) 4 I.at. 128, 85 I.C. 543, ('25) A.P. 438.

(i) *Ramaswami v. Govindasami* (1918) 42 Mad. 319, 49 I.C. 625.

(j) *Sidhraj v. Alli Haji* (1923) 47 Bom. 244, 67 I.C. 57, ('23) A.B. 33. See also *Re Benzon* (1914) 2 Ch. 68 [administration suit].

(k) See Prov. I. A., 1920, ss. 35, 39 and 43 (1).

(l) See *Malchand v. Rajdhar* (1925) 23 All. L.J. 975, 83 I.C. 544, ('25) A.A. 735, where the leave to sue was conditional, and it was held that such leave did not count.

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or application in respect of a debt provable but not proved under that Act. There is no reason why a similar provision should not be introduced into the Presidency-towns Insolvency Act. Perhaps the better course would be to insert a section in the Indian Limitation Act, 1908, providing for cases under both the Insolvency Acts.

Acknowledgment of debt in petition or schedule.—The admission by an insolvent of a debt in his petition (*m*), or schedule (*n*), is an acknowledgment within sec. 19 of the Indian Limitation Act, 1908.

Saving of rights of secured creditors.

258. Who are secured creditors [P.-t. I. A., s. 2 (g); Prov. I. A., s. 2 (1) (e)].—"Secured creditor" means a person holding a mortgage (*o*), charge (*p*), or lien (*q*), on the property of the debtor or any part thereof as a security for a debt due to him from the debtor (*r*). The expression includes a landlord who under the enactment for the time being in force has a charge on land for the rent of that land (*s*). The definition excludes a personal obligation to give a security or a personal obligation to make a security effectual, *e.g.*, a covenant by the mortgagor of a life policy to pay premiums on the policy (*t*).

1. Property in custody of receiver.—A decree-holder who has obtained an order for the appointment of a receiver of the property of the judgment-debtor is not thereby made a secured creditor. Such an order does not give the person who has obtained it any lien upon the property of the judgment-debtor, but places it in the custody of the receiver to be held by him as agent for the Court, and not for the creditor (*u*).

(*m*) *Rampal Singh v. Nandlal* (1911) 16 C. W. N. 346, 13 I.C. 603.

(*n*) *Shrigopal v. Dhanalal* (1911) 35 Bom. 383, 9 I.C. 944, [where the English law is also discussed]; *A. K. R. M. M. C. T. Chettyar v. S. E. Munnee* (1928) 6 Rang. 533, ('28) A. R. 326.

(*o*) "Mortgage" is defined in s. 58 of the Transfer of Property Act, 1882.

(*p*) "Charge" is defined in s. 100 of the Transfer of Property Act, 1882. A charge may be created by act of parties or by operation of law. As to charges created by operation of law, see s. 55 (4) (b) [vendor's lien] and s. 55 (6) (b) [purchaser's lien]. See also *Subarmanian v. Ramakrishna* (1922) 42 Mad. L. J. 426, 70 I.C. 317, ('22) A.M. 336, and *Levy v. Stogdon* (1898) 1 Ch. 478.

(*q*) Liens are of two kinds, namely,

general and special. As to the general lien of attorneys, bankers, factors, policy brokers and wharfingers, see s. 171 of the Indian Contract Act, 1872. As to special liens, see s. 95 (seller's lien), s. 169 (lien of finder of goods), s. 170 (bailee's lien), s. 173 (pawnee's lien), and s. 221 (agent's lien).

(*r*) Prov. I. A., s. 2 (1) (e); B.A., 1914, s. 167; *Krishna Chinnai & Sons v. Matubhai* (1929) 53 Bom. 290, 117 I.C. 440, ('29) A. B. 107.

(*s*) P.-t. I. A., s. 2 (g). See *Parbati v. Raja Shiam Rikh* (1922) 44 All. 296, 299, 66 I.C. 214, ('22) A.A.74.

(*t*) *Deering v. Bank of Ireland* (1887) 12 App. Cas. 20, 26.

(*u*) *Re Dickinson* (1888) 22 Q.B.D. 187; *Re Potts* (1893) 1 Q.B. 648; *Re Anglesey* (1903) 2 Ch. 727; *Re Pearce* (1919) 1 K.B. 354.

2. *Executor's right of retainer*.—In England an executor has a right to retain a debt due to himself from the testator, but this right does not make him a secured creditor (v). In India an executor has no right of retainer.

3. *Landlord's power of distress*.—A landlord whose rent is in arrear is not a secured creditor simply because he has a power of distress (w).

4. *Lease of mortgaged property by mortgagee to mortgagor*.—Where a mortgagee in whose favour a usufructuary mortgage has been executed gives a lease of the mortgaged property to the mortgagor at a rent equivalent to the amount of interest, and the property is charged with payment of the rent, the mortgagee is a secured creditor in respect of the rent (x).

259. Rights of secured creditors not affected by order of adjudication [P.-t. I. A. s. 17; Prov. I. A., s. 28 (2) & (6)].—This section, as already stated, provides that on the making of an order of adjudication the property of the insolvent shall vest in the Official Assignee or Receiver. It further provides that after an order of adjudication has been made no creditor shall have any remedy against the property of the insolvent except as provided by the insolvency law, and, further, that no creditor shall commence any suit or other proceeding except with the leave of the Insolvency Court. At the same time it is provided by this section that nothing contained in it shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if the section had not been passed. In short, the right of a secured creditor to realise or otherwise to deal with his security is unaffected by the order of adjudication. The Court therefore has no power to restrain a mortgagee of the insolvent's property from selling the property in the exercise of his power of sale (y). The fact that the mortgage debt is not included in the schedule does not affect the rights of the secured creditor (z). Nor does failure of the secured creditor to appear and prove his debt in insolvency affect his rights (a).

260. Secured creditor and leave to sue.—A secured creditor is entitled to commence a suit to realise his security without the leave of the Insolvency Court (b). If he has obtained a decree for sale on his mortgage before the insolvency of the mortgagor, no leave is necessary to execute the decree, and if the property is sold in execution of the decree, the purchaser will acquire a good title to it against the Official Assignee or

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(v) *Lee v. Nuttall* (1879) 12 Ch.D. 61.

(w) *Thomas v. Patent Leonite Co.* (1881) 17 Ch.D. 251, 257.

(x) *Altaf Ali Khan v. Lalta Prasad* (1897) 19 All. 496, followed in *Bishambhar Nath v. R. G. Bansal & Co.* (1926) 24 All. L. J. 641, 95 I. C. 893, ('26) A. A. 578.

(y) See *Re Evelyn* (1894) 2 Q. B. 302.

(z) *Shridhar v. Atmaram* (1883) 7 Bom. 455; *Shridhar v. Krishnaji* (1888) 12 Bom. 272; *Sheoraj Singh v. Gauri Sahai* (1899) 21 All. 227.

(a) *Shridhar v. Atmaram* (1883) 7 Bom. 455; *Shridhar v. Krishnaji* (1888)

12 Bom. 272; *Sheoraj Singh v. Gauri Sahai* (1899) 21 All. 227;

(b) *Lang v. Heptullabhai* (1914) 38 Bom. 359, 21 I. C. 714; *Official Receiver, Coimbatore v. Palani-swami Chetti* (1925) 44 Mad. 750, 38 I. C. 934, ('25) A. M. 1051; *Tyeb Ali v. Purna* (1926) 43 Cal. L. J. 219, 228, 93 I. C. 898, ('26) A. C. 618; *Bai Kashi v. Ohunilal* (1929) 31 Bom. L.R. 1199. As to English cases, see *White v. Simmons* (1871) L. R. 6 Ch. App. 555; *Ex parte Hirst* (1979) 11 Ch. D. 278.

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Receiver (c). A different view, however, has been taken by the High Court of Rangoon. It has been held by that Court that leave to sue is necessary even for the institution of a suit by a mortgagee to realize his security, and that the proviso to this section is confined in its operation to cases where a mortgagee can realize his security without the institution of a suit (d). This decision, it is submitted, is not correct. If it were correct, the provisions of the corresponding sec. 28 (6) of the Provincial Insolvency Act, would be almost nugatory, having regard to sec. 69 of the Transfer of Property Act, 1882, which enumerates the cases in which a power of sale can be exercised without the intervention of the Court. The learned Judge in his judgment refers first to *White v. Simmon* (c), a case under the Bankruptcy Act, 1869, where it was held that a mortgagee may, instead of applying in bankruptcy, proceed in Chancery for realizing his security, the jurisdiction in Chancery not being taken away by the Bankruptcy Act, 1869. He then goes on to say that there was no provision in sec. 12 of the Bankruptcy Act, 1869, for leave to sue, and that the provision as to leave was first introduced in sec. 9 of the Bankruptcy Act, 1883. This, no doubt, is so, but the learned Judge said that "the law was deliberately changed by the Act of 1883 with the object of closing the loophole which those cases had left open," suggesting that *White v. Simmon* was no longer law, and that a mortgagee cannot after the Bankruptcy Act of 1883 proceed in Chancery for realizing his security. This, it is submitted, is not correct. Under the English law a secured creditor may even now bring his action in the Chancery Division of the High Court, though, in that case, if the bankruptcy is in the High Court the action may be transferred under sec. 105 (4) of the Bankruptcy Act, 1914 to the Judge to whom bankruptcy business is assigned (f). It is also submitted that the term "creditor" in the first part of this section does not refer to a secured creditor; there are separate definitions of "creditor" and "secured creditor" in both the Acts (g). The provisions of sec. 53 (2) of the Presidency-towns Insolvency Act and the corresponding sec. 51 (2) of the Provincial Insolvency Act, also lend support to the view that a secured creditor may institute a suit to realize his security without the leave of the Insolvency Court.

261. Only equity of redemption vests in Official Assignee or Receiver.—If the mortgagor becomes insolvent, all that vests in the Official Assignee or Receiver is the equity of redemption. The Official Assignee or Receiver may therefore sell the equity of redemption, but he cannot sell the mortgaged property. If the Official Assignee or Receiver purports to sell the property, the sale can only pass the equity of redemption to the purchaser (h). The mortgagee may therefore ignore the sale by the Official Assignee or Receiver, and institute a suit for sale of the mortgaged property against the purchaser (i); or he may sue the Official Assignee or Receiver

- (c) *Sheoraj Singh v. Gauri Sahai* (1899) 21 All. 227. See also P.-t. I. A., s. 3 (2); Prov. I. A. s. 51 (2).
- (d) *In the matter of L. W. Nasse* (1929) 7 Rang. 201, 118 I. C. 615, ('29) A. R. 229.
- (e) (1871) L. R. 6 Ch. App. 555.
- (f) See Williams on Bankruptcy, 13th ed., p. 472.

- (g) P.-t. I. A., s. 2 (a) & (g); Prov. I. A., s. 2 (1) (a) & (e).
- (h) *Shridhar v. Krishnaji* (1888) 12 Bom. 272; *Lang v. Heptulabhai* (1914) 38 Bom. 359, 21 I. C. 714; *Kaniappa v. Raju* (1924) 47 Mad. 605, 79 I. C. 850, ('24) A. M. 761.
- (i) *Kaniappa v. Raju* (1924) 47 Mad. 605, 79 I. C. 850, ('24) A. M. 761.

for payment of the mortgage debt out of the proceeds of the sale of the property (j).

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It may here be observed that in cases governed by the Presidency-towns Insolvency Act the Insolvency Court has power to direct a sale of the mortgaged property on the application of the mortgagee or of the Official Assignee with the consent of the mortgagee (k). A Court under the Provincial Insolvency Act has no such power. If such a Court directs a sale of the mortgaged property without the consent of the mortgagee, the sale is not binding on the mortgagee, even though the order provides that the sale proceeds should be applied in the first instance towards payment of the mortgagee's claim (l).

262. Suit to realise security: joinder of Official Assignee or Receiver.—The Official Assignee or Receiver is a necessary party to a suit by a secured creditor to realise his security, whether the suit is instituted before or after insolvency. The reason is that the equity of redemption vests in the Official Assignee or Receiver, and he alone is entitled to deal with it. If he is not made a party, he will not be bound by any decree that may be passed in the suit, or by the sale of the mortgaged property in execution of any such decree, even if he had before the decree was passed applied to be joined as a party and his application had been refused. He may sue to set aside the decree as well as the sale (m).

263. Dispute as to validity of mortgage.—The Registrar has no power to decide the question of the validity or otherwise of a mortgage. This is a question to be determined by the Insolvency Court (n).

3. *Stay of suits and other proceedings.*

264. Stay of suits and other proceedings.—The Courts have power after an order of adjudication has been made to stay suits and other proceedings pending against the insolvent. Under the Presidency-towns Insolvency Act that power is given both to the Insolvency Court (para. 265) and the Court in which the suit or other proceeding is pending (para. 266). Under the Provincial Insolvency Act that power is confined only to the Court in which the suit or other proceeding is pending (para. 266). Further, under the Presidency-towns Insolvency Act, the Insolvency Court has the power to stay or annul insolvency proceedings pending under the Provincial Insolvency Act in a District Court (para. 265A).

265. (1) Power of Insolvency Court under Presidency-towns Insolvency Act to stay suit or execution proceeding [P.-t. I. A., s. 18 (1) & (2)].—The Court exercising insolvency jurisdiction has power

(j) *Lang v. Heptullahai* (1914) 38 Bom. 359, 21 I. C. 714.

(k) P.-t. I. A., Sch. II, r. 18.

(l) *Sant Prasad Singh v. Sheodut Singh* (1923) 2 Pat. 724, 728, 77 I. C. 589, ('24) A. P. 259.

(m) *Kala Chand v. Jagannath* (1927) 54 I. A. 190, 54 Cal. 595, 101 I. C. 442, ('27) A. P. C. 108, reversing

s. c. in 29 C. W. N. 771, 86 I. C. 1 42, ('25) A. C. 785; *Punithavelu v. Bhashyam* (1902) 25 Mad. 406, 421; *In the matter of L. W. Nasse* (1929) 7 Rang. 201, 118 I. C. 615, ('29) A. R. 229.

(n) *Re Lalbihari Shah* (1920) 47 Cal. 721, 60 I. C. 889, a case under P.-t. I. A., Sch. II, r. 18.

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under the Presidency-towns Insolvency Act at any time after the making of an order of adjudication to stay "any suit or other proceeding" pending against the insolvent before any Judge or Judges of that Court or in any other Court subject to the superintendence of that Court no such power is conferred upon Courts exercising insolvency jurisdiction under the Provincial Insolvency Act (o).

There is a conflict of opinion whether the power to stay is to be exercised by a Judge of the High Court sitting in insolvency or by the High Court on its Appellate side. The former view was taken in *Re Naginlal Maganlal* (p), the latter in *Re Maneckchand* (q), both decisions of the High Court of Bombay. The former view, it is submitted, is the correct one.

The "other proceeding" in sec. 18 (1) of the Presidency-towns Insolvency Act should be *ejusdem generis* with or analogous to a suit (r). The expression "other proceeding" refers to proceedings in the nature of suits, execution or other legal proceedings (s). It does not include a proceeding in insolvency. Therefore, a Judge of the High Court sitting in insolvency has no power under sec. 18 (1) to stay insolvency proceedings pending against the same debtor under the Provincial Insolvency Act in a District Court (t). This led to the insertion in the Act of a new section, being sec. 18A, which is considered in para. 265A below.

265A. (2) Power of Insolvency Court under Presidency-towns Insolvency Act to stay insolvency proceedings pending in subordinate Courts [P.-t. I. A., s. 18A].—Sec. 18A of the Presidency-towns Insolvency Act provides that the Court exercising insolvency jurisdiction may, at any time after the presentation of an insolvency petition, stay any insolvency proceedings pending against the debtor in any Court subject to its superintendence, and may, at any time after the making of an order of adjudication, annul an adjudication against the debtor made by any such Court. This section is new. It was inserted by sec. 3 of the Insolvency Law (Amendment) Act, 1930. Before the amendment it was held that the Court exercising insolvency jurisdiction under the Presidency-towns Insolvency Act had no power to stay proceedings in insolvency pending in respect of the same debtor under the Provincial Insolvency Act in a subordinate Court (see para. 265 above). The need for such a power was soon felt as it had become a common practice for debtors, who carried on business in Calcutta, to retire to some part of the province sufficiently remote, and get an accommodating creditor to present a petition in insolvency against them in a District Court. This

(o) See *Official Receiver v. Palaniswami Chetti* (1925) 48 Mad. 750, 88 I.C. 934, ('25) A. M. 1051 [Prov. I. A., s. 29].

(p) (1925) 49 Bom. 788, 91 I.C. 160, ('25) A. B. 543.

(q) (1923) 47 Bom. 275, 75 I.C. 61, ('22) A.B. 390.

(r) *Re Maneckchand* (1923) 47 Bom. 275, 279, 75 I. C. 61, ('22) A. B. 390.

(s) *Sarat Chandra Pal v. Barlow & Co.*

(1928) 56 Cal. 712, ('28) A. C. 782.

(t) *Re Naginlal Maganlal* (1925) 49 Bom. 788, 91 I. C. 160, ('25) A. B. 543; *Sarat Chandra Pal v. Barlow & Co.* (1928) 56 Cal. 712, ('28) A. C. 782; *Re Maneckchand* (1923) 47 Bom. 275, 75 I. C. 61, ('22) A. B. 390. See also *M. A. Sassoon & Sons, Ltd. v. Gosto Behari De* (1927) 31 C. W. N. 847, 103 I. C. 754, ('27) A. C. 629.

was done with the object of discouraging Calcutta creditors from prosecuting their claims or securing a searching investigation of the debtor's conduct and affairs. The new section gives power to the Judge of a High Court sitting in insolvency to stay or annul insolvency proceedings pending under the Provincial Insolvency Act in any Court subject to its superintendence in respect of the same debtor.

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266. (3) Power of Civil Court under both Acts to stay suit or other proceeding pending before it [P.-t. I. A., s. 18 (3); Prov. I. A., s. 29].—Under both the Acts any Court in which a suit or other proceeding is pending against the insolvent, may, on proof that an order of adjudication has been made against him, either stay the suit or proceeding or allow it to continue on such terms as the Court may think just. The Court, however, has no power to *dismiss* a suit or to *discharge* execution proceedings (†1). The power to stay can only be exercised after an order of adjudication has been made. The mere filing of a petition for adjudication does not empower the Court to grant a stay (u).

267. Power to stay discretionary.—The Court has discretion to stay or not to stay a suit (v). Where a suit is in respect of a debt provable in insolvency, it should be stayed unless there are special circumstances as, for instance, that the suit was at the time of insolvency ripe for hearing and the amount of proof against the insolvent's estate would not be seriously affected, or that the suit, in cases governed by the Presidency-towns Insolvency Act, is about to be barred by limitation (see para. 257 above). In *Brownscombe v. Fair* (w), Wills, J., said: "The discretion is not an arbitrary one, but is to be exercised on recognised principles. Now there is such a principle here. The intention of the Legislature in the Bankruptcy Act was that on the bankruptcy of a man no more litigation between the bankrupt and his creditors should be permitted except in special circumstances."

268. What proceedings may be stayed and what not.—This section is ancillary to the preceding section (x) which says that after an order of adjudication has been made no suit or other proceeding in respect of any debt provable in insolvency shall be commenced without the leave of the Insolvency Court. The object of the section is to compel persons who have claims against the insolvent to prosecute their claims in the Insolvency Court (y); but the claim must be in respect of a debt provable in insolvency (z).

(†1) *Marotirao v. Govind* ('29) A.N. 356.

(u) See *M. A. Sassoon & Sons, Ltd. v. Gosto Behari De* (1927) 31 C. W. N. 847, 849, 103 I. C. 754, ('27) A. C. 629, [a case under P.-t. I. A., s. 18 (1)].

(v) *Brownscombe v. Fair* (1888) 58 L. T. 85; *Mahomed Haji Essack v. Abdul Rahiman* (1917) 41 Bom. 312; 33 I. C. 694; *Motilal v. Madhavrao* (1905) 7 Bom. L. R. 146 [I. I. A., s. 49]; *Govindasami*

v. Ranaveerapandian ('26) A. M. 1145, 97 I. C. 765.

(w) (1888) 58 L. T. 85.

(x) P.-t. I. A., s. 17; Prov. I. A., s. 28 (2).

(y) *Sarat Chandra Pal v. Barlow & Co.* (1928) 48 Cal. L. J. 298, 300, 304, ('28) A. C. 782.

(z) As to what debts are provable in insolvency and what not, see P.-t. I. A., s. 46 and Prov. I. A., s. 34.

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The obligation to make payments of alimony by a husband to his wife directed to be paid by a Divorce Court is not a liability provable in insolvency, and proceedings to enforce such payments will not be stayed (a). Nor will the Court stay any suit against an insolvent in respect of a claim from which he would not be released by an order of discharge, such as a suit for damages for fraud or other tort (b); but the property of the insolvent having vested in the Official Assignee or Receiver, execution cannot be issued until after discharge (c).

269. Whether suits commenced after order of adjudication and without leave can be stayed.—It would appear from the language of this section that the only suits or proceedings that could be stayed under this section are suits or proceedings pending at the date on which the order of adjudication was made. A different view, however, has been taken by the High Court of Bombay, and it has been held by that Court that the language of sec. 18 (3) of the Presidency-towns Insolvency Act is wide enough to justify the stay of a suit, though commenced after the order of adjudication and without the leave of the Court. In that case the plaintiff applied for and obtained the leave of the Insolvency Court after the institution of the suit, and the suit was stayed (d). This decision was followed with considerable hesitation by the same High Court in a later case. In that case no leave of the Insolvency Court was obtained either before or after the institution of the suit. It was contended for the defendant that the suit should be dismissed, as it was instituted without leave, but the Court stayed the suit under this section (e). In a Madras case the plaintiff instituted a suit against the insolvent without the leave of the Insolvency Court. Subsequently he applied to the Insolvency Court for leave, but leave was refused on the ground that it ought to have been obtained before the institution of the suit. The Court, however, expressed the opinion that the proper remedy of the plaintiff was to apply to the Court in which the suit was instituted for leave to continue the suit under this section (f). In England where an action is commenced without the leave of the Bankruptcy Court the practice seems to be to stay the action. This, however, is not done under the section of the Bankruptcy Act which provides for a stay of actions (g), but under the section which says that no action shall be brought after a receiving order has been made without

(a) *Kerr v. Kerr* (1897) 2 Q. B. 439.
See also *Official Receiver v. Kalawa* ('27) A. M. 403, 99 I. C. 564 [suit for maintenance and for a declaration of charge].

(b) *Ex parte Coker* (1875) L. R. 10 Ch. App. 652. See P.-t. I. A., s. 45; Prov. I. A., s. 44.

(c) *Cobham v. Dalton* (1875) L. R. 10 Ch. App. 655.

(d) *Mahomed Haji Essack v. Abdul Rahiman* (1917) 41 Bom. 312, 33 I. C. 694.

(e) *Bheraj Samarthji & Co. v. Vasantrao Govindrao Prabhakar* (1929) 31 Bom. L. R. 981, ('29) A. B. 398.

(f) *Ghouse Khan v. Bala Subba Rowther* (1928) 51 Mad. 833, 105 I. C. 109, ('27) A. M. 925.

(g) B. A., 1914, s. 9.

the leave of the Bankruptcy Court (*h*). The High Court of Lahore has held that a suit commenced without leave cannot be stayed under this section, and that it should be dismissed (*i*).

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270. Stay of execution against insolvent's property.—The power to stay proceedings under this section can only be exercised after an order of adjudication has been made. In a Sind case it was held that though the Act did not provide in terms for a stay of execution before an order of adjudication was made, the Court executing the decree had inherent jurisdiction to stay execution against the property of the insolvent until the Insolvency Court passed an order of adjudication or dismissed the insolvency petition (*j*).

271. Stay of execution against insolvent's person.—It has been held by the High Court of Rangoon that this section applies to a stay of execution against the person of a debtor. It has accordingly been held that when a judgment-debtor, on being arrested in execution of a decree, produces an order of adjudication, made after the execution proceedings were commenced, the executing Court should act under the provisions of sec. 55 of the Code of Civil Procedure, 1908, and require him to give security that he will appear, when called upon, in any proceeding in insolvency or upon the decree in execution of which he was arrested (*k*).

272. Secured creditors and stay of suit.—As a general rule, the Court will not stay a suit by a mortgagee or other secured creditor to realise his security (*l*). The adjudication of the mortgagor as an insolvent does not operate as a stay of a mortgagee's suit to realize his security. Nor does an application by the Official Assignee or Receiver to set aside the mortgage as void against the creditors (*m*) operate *ipso facto* as a stay of the suit, though the Court in which the suit is instituted may stay the suit until the disposal of the application by the Insolvency Court (*n*).

4. *Effect on transactions.*

273. Effect on transactions.—An order of adjudication deprives the insolvent of all power to enter into transactions which will

- (*h*) B. A., 1914, s. 7. See Halsbury Laws of England, vol. 2, p. 63, f. n. (b), and *Brownscombe v. Fair* (1888) 58 L. T. 85; *Blount v. Whitely* (1899) 6 Mans. 48, (1899) 79 L. T. 635.
- (*i*) *Panna Lal Tassadug Hussain v. Hira Nand Jiwan Ram* (1927) 8 Lah. 593, 102 I.C. 37, ('28) A.L. 28.
- (*j*) *Lyon Lord & Co. v. Virbhandas* ('24) A. S. 69, 76 I. C. 380. See Mulla's Code, note under O. 21, r. 37.

- (*k*) *M. V. A. L. Vinvanathan Chettiar v. Abdul Majid* (1925) 3 Rang. 187, 89 I. C. 381, ('25) A. R. 305.
- (*l*) *Ex parte Hirst* (1879) 11 Ch. D. 278. See also *Sharp v. McHenry* (1887) 55 L. T. 747.
- (*m*) See P.-t. I. A., s. 55; Prov. I. A., s. 53.
- (*n*) *Official Receiver, Coimbatore v. Palaniswami Chetti* (1925) 48 Mad. 750, 88 I.C. 934, ('25) A. M. 1051.

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bind his creditors in respect of his property. After adjudication the Official Assignee or Receiver alone is entitled to deal with the insolvent's property and he alone can give a title to a purchaser. Every transaction entered into by the insolvent after adjudication in relation to his property is void as against the Official Assignee or Receiver. If a person pays a sum of money to the insolvent after an order of adjudication, he will have to pay it again to the Official Assignee or Receiver even though the payment was made in fulfilment of a contract entered into with the insolvent before the order of adjudication and though he had no notice of the order of adjudication. If after adjudication a person buys property from the insolvent, he acquires no title to it, and he will have to deliver back the property to the Official Assignee or Receiver without any claim to a return of the price paid by him (o). And if an insolvent, concealing the fact of his adjudication, files a suit against a person indebted to him and obtains a decree, the decree is a nullity and it cannot be executed by him (p).

5. *Disqualifications of insolvent.*

274. Disqualifications of insolvent [P.-t. I. A., s. 103A; Prov. I. A., s. 73].—An undischarged insolvent so long as he remains undischarged is under certain disabilities such as incapacity to hold certain offices. This is indeed as it should be. It has accordingly been provided by both the Acts that where a debtor is adjudged or readjudged insolvent he is disqualified from being appointed or acting as a Magistrate; being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached; and being elected or sitting or voting as member of any local authority.

Removal of disqualifications.—The disqualifications cease if the order of adjudication is annulled (q) or if the insolvent obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part. The Court may grant or refuse such certificate as it thinks fit. The Provincial Insolvency Act contains an express provision allowing an appeal from an order refusing a certificate.

275. Insolvency caused by misfortune without misconduct.—The idea which underlies the enactment appears to be that he who has made shipwreck of his own fortune is not fit to be trusted to guide and care for the interests of others. There may, however, be cases in which a man

(o) See *Ex parte Rabbidge* (1878) 8 Ch.

D. 367; *Re Teale* (1912) 2 K. B. 367.

(p) *Rozario v. Muhomed* (1924) 48 Bom.

583, 83 I.C. 34, ('24) A.B. 460.

(q) See P.-t. I. A., s. 21 (1); Prov. I. A., s. 35.

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may be adjudged insolvent without thereby raising a presumption of his unfitness for holding a public position. It has accordingly been provided that the disqualifications will cease if the insolvent obtains from the Court his discharge with a certificate that his insolvency was caused by misfortune without any misconduct on his part. The power of the Court to grant the certificate is a discretionary one. The burden of proving that the insolvency was caused by misfortune without any misconduct lies on the insolvent. Misfortune is "an adverse event not immediately dependent on the actions or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculations in reference to the interests either of himself or of others (r)". A man reduced to poverty by an act of God destroying his property suffers from misfortune without any misconduct on his part. A man who gambles so much that if he is unsuccessful he cannot pay his creditors, does not owe his situation to misfortune without misconduct, though he would probably say that he had been unfortunate in his play. Similarly if a man institutes a suit for a divorce against his wife and a co-respondent on the ground of adultery, but the suit is dismissed with costs which he is unable to pay and he is adjudged insolvent on the petition of the co-respondent, the insolvency cannot be said to have been caused by misfortune, though there may be no misconduct on his part, and he is not entitled to a certificate. Absence of misconduct does not by itself amount to misfortune. Further, misfortune as defined above, must be the sole cause of the insolvency. Where the insolvency is not solely the result of misfortune, it cannot be said to arise from misfortune. If the event which causes the insolvency is due partly to "misfortune" and partly to "misconduct," it cannot come within the exemption (s). If a man publishes a libel against another (t), or slanders another (u), it is not a "misfortune," and if he is unable to pay the costs of the action brought against him and insolvency follows, he is not entitled to a discharge.

6. *Disqualification of insolvent to act as trustee.*

275A. Insolvency of trustee [P.-t. I. A., s. 119].—Where an insolvent is a trustee within the Indian Trustee Act, 1866, sec. 35 of that Act, which empowers the Court to appoint a new trustee in certain cases, will have effect so as to authorise the appointment of a new trustee in substitution for the insolvent (whether he voluntarily resigns or not), if it appears expedient to do so, and the new trustee will have the same rights and powers as he would have had if appointed by decree in a suit.

(r) *Re Lord Collin Campbell* (1888) 20 Q. B. D. 816, 822, per Fry, L. J.

(s) *Re Lord Collin Campbell*, supra.

(t) *Re Burgess* (1887) 4 Morr. 186.

(u) *Re Thompson* (1918-19) B. & C. R.

150. As to suspension of a pleader's sanad on his insolvency, see *Government Pleader v. Deshpande* (1928) 52 Bom. 559, ('28) A. B. 385.

LECTURE VI.

PART II.

A.—PROCEEDINGS CONSEQUENT ON ORDER OF ADJUDICATION, ETC.

PRESIDENCY-TOWNS INSOLVENCY ACT, SS. 24-27, 33-37.

1. *Schedule.*

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276. Insolvent's schedule (s. 24).—Where an order of adjudication is made against a debtor, he is required to prepare and submit to the Court a schedule verified by affidavit, in such form and containing such particulars of and in relation to his affairs as may be prescribed. The schedule must be submitted, if the order is made on the petition of the debtor, within thirty days from the date of the order, and if the order is made on the petition of a creditor, within thirty days from the date of service of the order. If the insolvent fails, without reasonable excuse, to comply with these requirements, the Court may, on the application of the Official Assignee or of any creditor make an order for his committal to civil prison, and, in addition, the Official Assignee may, at the expense of the estate, cause the schedule to be prepared in the manner prescribed by the Rules.

2. *Protection order.*

277. Protection order (s. 25).—Any insolvent who has submitted his schedule may apply to the Court for protection, and the Court may, on such application, make an order for protection of the insolvent from arrest or detention. A protection order may apply either to all the debts mentioned in the schedule or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit. Such an order protects the insolvent from being arrested or detained in prison for any debt to which it applies, and any insolvent arrested or detained contrary to its terms is entitled to his release: provided that no such order shall operate to prejudice the right of any creditor in the event of the order being revoked or the adjudication annulled.

Any creditor is entitled to appear and oppose the grant of a protection order, but the insolvent is *prima facie* entitled to such order on production of a certificate signed by the Official Assignee that he has so far conformed to the provisions of this Act (v).

(v) Under Bombay Rule 90 notice of an application for a protection order need not be given to any creditors other than execution creditors.

The Court may make a protection order before an insolvent has submitted his schedule if it thinks it necessary to do so in the interests of the creditors.

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278. Discretion of Court.—A protection order is a privilege to be granted or withheld as the Court in its discretion may determine. In the exercise of this discretion there is a distinction between cases, where the application for protection is made after the insolvent's application for discharge is heard and his discharge suspended, and cases where protection is applied for before the hearing of the application for discharge. In the former case the Court will have regard to the character and circumstances of the insolvent. Where the insolvency is of a flagrantly culpable kind, being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money has been squandered, protection will not be granted. The Court will in such a case look into the reasons given in the judgment for suspending the discharge. Thus where discharge was suspended on proof of facts specified in sec. 39 (2) (a), (b), (c), (d), (f) and (j) of the Presidency-towns Insolvency Act (a), it was held that no protection should be granted (b).

Different considerations apply where protection is applied for before the hearing of the application for discharge. The good faith or bad faith of an insolvent does not ordinarily come under the scrutiny of the Court until the application for his discharge is heard, and before discharge the Court has hardly any materials on which it can come to any finding as to the conduct of the insolvent. At the initial stage of insolvency the affairs of the insolvent have to be investigated and his property has to be realised; it is in the interest of the creditors themselves that this should be done and it cannot be done without considerable difficulty if the insolvent is put in jail or has to go into hiding to escape from arrest. The Court must act in the interest of all the creditors and not in the interest of any particular creditor who wishes to put the insolvent in jail. The section clearly intends that if an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors, and should not be rendered liable to pressure whereby one creditor may get undue advantage over another. The insolvent is *prima facie* entitled after adjudication to an order of protection in the absence of any report against his conduct, and protection is granted as a matter of course. The Court will not, on an application for an *ad interim* protection, inquire into allegations of concealment of property or into charges of fraud made against the insolvent by opposing

(a) See Prov. I. A., s. 42 (1) (a), (b), (c), (d), (f) and (i).

(b) *Mahomed Haji Issac v. Shaikh Abdul Rahman* (1916) 40 Bom.

401, 31 I. C. 507; *Mahomed Roshan v. Gulam Mohiddin* (1929) 31 Bom L. R. 206, (29) A. B. 135.

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creditors, because these are matters to be investigated at the hearing of the petition (c).

It is a good ground for refusing a protection order that the insolvent has failed to produce his books of account before the Official Assignee. It is no excuse that the books are with a third party and that the Official Assignee could apply to the Court (d) for an order on the third party to make them over to him. It is for the insolvent himself in the first instance to take all steps in his power to effect the production of the books (e). Delay in applying for a discharge may also be a ground for refusing protection unless it is satisfactorily accounted for (f).

279. Official Assignee's certificate.—Any creditor may appear and oppose the grant of a protection order, but the insolvent is *prima facie* entitled to such order on production of a certificate signed by the Official Assignee that he has so far conformed to the provisions of the Act. This provision indicates the lines along which the discretion which the Court has in granting protection should be exercised when a creditor opposes the grant. If the insolvent produces the certificate, the onus is thrown on the opposing creditor of showing cause why the protection order should not be made. It is open to the creditor to show that the insolvent has imposed on the Official Assignee and that in spite of the certificate he has not conformed to the provisions of the Act or that the insolvent has been guilty of undue delay in applying for his discharge, for the Court will not countenance an insolvent resting unreasonably beneath the shade of the protection order (g). There is no provision as to a Receiver's certificate in the Provincial Insolvency Act, but the Court, it is presumed, will take the Receiver's report into consideration in dealing with the application.

280. Protection before submission of schedule.—As a general rule, the Court will not make a protection order until after the insolvent has submitted his schedule. The Court, however, has the power to make the order even before the schedule is filed if it thinks it necessary to do so *in the interests of the creditors*; but no such order can be made before adjudication.

281. Refusal of protection order.—The mere fact that a protection order has been refused is no reason for committing the insolvent to jail in execution of a decree against him. Thus where after adjudication the insolvent had in execution proceedings taken out against him given security for his appearance, and on the protection order being refused the

(c) *Re Meghraj Gangabux* (1911) 35 Bom. 47, 7 I. C. 448. See also *In the matter of Dinendra Nath Mullick* (1905) 9 C. W. N. 231 [I. I. A., 1848].
(d) See P.-t. I. A., s. 36; Prov. I. A., s. 59A.

(e) *In the matter of Gopal Das Aurord* (1925) 30 C. W. N. 112, 91 I. C. 975, ('26) A. C. 260.
(f) See *Re Meghraj Gangabux* (1911) 35 Bom. 47, 48, 7 I. C. 448.
(g) *Re Meghraj Gangabux* (1911) 35 Bom. 47, 7 I. C. 448.

judgment-creditor again applied to commit the insolvent to jail on the ground that the insolvent had failed to produce his books of account in the insolvency proceedings, it was held that in the circumstances of the case the application should be refused (*h*). In the course of the judgment Rankin, C.J., said: "I would point out that in the circumstances such as the present one the law of India is extremely illogical and the position of the Court would appear to be very embarrassing. Here is a man who so long ago as 26th January of last year was adjudicated an insolvent and so far as we know all his properties would vest either in the Official Assignee or in the Receiver who would be appointed by the Court. It is said that he has not disclosed his books and he has been refused the protection order. Nevertheless the object of sending a man to jail for non-payment of debts if he is under an obligation to hand over all his assets to the Court of insolvency does not appear to me very convincing; still less does it appear to be consistent with the principle that this should be done by one creditor while the assets are supposed to have been impounded on behalf of all creditors."

3. *Meetings of creditors.*

282. Meetings of creditors [s. 26; Sch. I].—At any time after the making of an order of adjudication against an insolvent, the Court, on the application of the creditor or of the Official Assignee may direct that a meeting of creditors shall be held to consider the circumstances of the insolvency and the insolvent's schedule and his explanation thereof and generally as to the mode of dealing with the property of the insolvent. With respect to the summoning of meetings, voting at the meetings, and proof for the purposes of voting, the rules in the First Schedule to the Act are to be observed. Those rules are as follows:—

1. *Meetings of creditors.*—The Official Assignee may at any time summon a meeting of creditors, and shall do so whenever so directed by the Court or by the creditors by resolution at any meeting or whenever requested in writing by one-fourth in value of the creditors who have proved.

2. *Summoning of meetings.*—Meetings shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or, if he has not proved, at the address given in the insolvent's schedule, or such other address as may be known to the Official Assignee.

3. *Notice of meetings.*—The notice of any meeting shall be sent off not less than seven days before the day appointed for the meeting and may be delivered personally or sent by prepaid post letter, as may be convenient.

(*h*) *Nagoremull v. Lachmi Narain* (1928)
48 Cal. L. J. 531, 113 I. C. 854,

(29) A. C. 144.

Fara. 282 The Official Assignee may, if he thinks fit, also publish the time and place of any meeting in any local newspaper or in the local official Gazette.

4. *Duty of insolvent to attend if required.*—It shall be the duty of the insolvent to attend any meeting which the Official Assignee may, by notice, require him to attend, and any adjournment thereof. Such notice shall be either delivered to him personally or sent to him at his address by post at least three days before the date fixed for the meeting.

5. *Proceedings not to be avoided for non-receipt of notice.*—The proceedings held and resolutions passed at any meeting shall, unless the Court otherwise orders, be valid notwithstanding that any creditor has not received the notice sent to him.

6. *Proof of issue of notice.*—A certificate of the Official Assignee that the notice of any meeting has been duly given, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

7. *Costs of meeting.*—Where on the request of creditors the Official Assignee summons a meeting, there shall be deposited with the written request the sum of five rupees for every twenty creditors for the costs of summoning the meeting, including all disbursements: Provided that the Official Assignee may require such further sum to be deposited as in his opinion shall be sufficient to cover the costs and expenses of the meeting.

8. *Chairman.*—The Official Assignee shall be the chairman of any meeting.

9. *Right to vote.*—A creditor shall not be entitled to vote at a meeting unless he has duly proved a debt provable in insolvency to be due to him from the insolvent, and the proof has been duly lodged one clear day before the time appointed for the meeting.

10. *No vote in respect of certain debt.*—A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained (h1).

11. *Secured creditor.*—For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence (i).

(h1) See *Ex parte Ruffle* (1873) L. R. 8
Ch. App. 997, per Mellish, L. J.
(i) See *Re Safety Explosives, Limited*
(1904) 1 Ch. 226; *Re Rowe* (1904)

2 K. B. 489; *Re Pawson* (1917)
2 K. B. 527; *Re Maxson* (1919)
2 K. B. 330.

12. *Proof in respect of negotiable instruments.*—Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the insolvent is liable, such bill of exchange, note, instrument or security must, subject to any special order of the Court made to the contrary, be produced to the Official Assignee before the proof can be admitted for voting. **Para. 282**

13. *Power to require creditor to give up security.*—It shall be competent to the Official Assignee, within twenty-eight days after a proof estimating the value of a security has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally, on payment of the value so estimated.

14. *Proof by partner.*—If one partner in a firm is adjudged insolvent, any creditor to whom that partner is indebted jointly with the other partners in the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors and shall be entitled to vote thereat.

15. *Power of Official Assignee to admit or reject proof.*—The Official Assignee shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether the proof of a creditor should be admitted or rejected, he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

16. *Proxy.*—A creditor may vote either in person or by proxy.

17. *Instrument of proxy.*—Every instrument of proxy shall be in the prescribed form and shall be issued by the Official Assignee.

18. *General proxy.*—A creditor may give a general proxy to his attorney or to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

19. *Proxy to be deposited one day before date of meeting.*—A proxy shall not be used unless it is deposited with the Official Assignee one clear day before the time appointed for the meeting at which it is to be used.

20. *Official Assignee as proxy.*—A creditor may appoint the Official Assignee to act as his proxy.

21. *Adjournment of meeting.*—The Official Assignee may adjourn the meeting from time to time and from place to place, and no notice of the adjournment shall be necessary.

22. *Minute of proceedings.*—The Official Assignee shall draw up a minute of the proceedings at the meeting and shall sign the same.

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4. *Public examination.*

283. Public examination of insolvent [P.-t. I. A., s. 27].—Where the Court makes an order of adjudication it is required to hold a public sitting on a day to be appointed by the Court, of which notice is to be given to creditors in the prescribed manner, for the examination of the insolvent and the insolvent must attend thereat in order that he may be examined as to his conduct, dealings and property. The examination is to be held as soon as conveniently may be after the expiration of the time for the filing of the insolvent's schedule. Any creditor who has tendered a proof, or a legal practitioner on his behalf, may question the insolvent concerning his affairs and the causes of his failure. The Official Assignee is required to take part in the examination of the insolvent; and for the purpose thereof, subject to such directions as the Court may give, may be represented by a legal practitioner. The Court may put such questions to the insolvent as it may think expedient.

The insolvent is to be examined upon oath, and it is his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper are to be taken down in writing and to be read over either to or by the insolvent and signed by him, and may thereafter be used in evidence against him and are to be open to the inspection of any creditor at all reasonable times. When the Court is of opinion that the affairs of the insolvent have been sufficiently investigated it is required to make an order declaring that his examination is concluded, but such order does not preclude the Court from directing further examination of the insolvent whenever it may deem fit to do so.

Where the insolvent is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the Court makes him unfit to attend his public examination, or is a woman who according to the customs and manners of the country ought not to be compelled to appear in public, the Court may make an order dispensing with such examination, or directing that the insolvent be examined on such terms, in such manner and at such place as to the Court seems expedient.

284. Scope of the examination.—This section is taken from sec. 17 of the Bankruptcy Act, 1883, now sec. 15 of the Bankruptcy Act, 1914. The only provision for the public examination of the insolvent in the Provincial Insolvency Act is that contained in sec. 24 (2) and (4). Under that Act the examination is held before the order of adjudication is made; under the Presidency-towns Insolvency Act the examination is held after the order of adjudication is made.

As in England so here the insolvent is to be examined "as to his conduct, dealings and property", in short he is to be examined as to his affairs. The scope of the inquiry is not limited to offences in connection with his insolvency, but extends to all matters which the Court may take into consideration on the application for discharge and which would justify a refusing or suspending or qualifying of an order of discharge (j). The object of the examination is not merely to obtain a full and complete disclosure of his assets and the

facts relating to the insolvency in the interests of his creditors, but is also for the protection of the public. In *Re Paget* (k), Lord Hanworth, M. R., said: "The debtor in the present case came up for public examination under the provisions of sec. 15 of the Bankruptcy Act, 1914, which require that a debtor against whom a receiving order has been made shall be publicly examined as to his 'affairs.' I use that word comprehensively, the object of the examination being not merely for the purpose of collecting the debts on behalf of the creditors or of ascertaining simply what sum can be made available for the creditors who are entitled to it, but also for the purpose of the protection of the public in the cases in which the bankruptcy proceedings apply, and that there shall be a full and searching examination as to what has been the conduct of the debtor in order that a full report may be made to the Court by those who are charged to carry out the examination of the debtor. To concentrate attention upon the mere debt collecting and distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law."

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285. Incriminating questions.—The object of the section, as stated above, is to secure a full and complete examination and disclosure of the facts relating to the evidence not merely in the interests of the creditors, but also in the interests of the public. The insolvent is therefore bound to answer all questions relating to his conduct, dealings and property which the Court may put of allow to be put even though the answers tend to criminate him (l).

285A. Use of answers in evidence.—Answers by an insolvent at his public examination may always be used against him in a proceeding taken against him personally, e.g., on an application to strike off his name as a solicitor on the ground of misconduct (ll), or in a criminal proceeding instituted against him under secs. 103 and 104 of the Presidency-towns Insolvency Act (m) [Provincial Insolvency Act, ss. 69, 70], but not in a proceeding taken against him in a representative capacity, e.g., as a trustee (m1). They are not, however, evidence in any suit or other proceeding against a third person, not even on a subsequent application by the Official Assignee or Receiver in the same insolvency (n). Thus the answers given by an insolvent are not evidence against a third person in a proceeding taken by the Official Assignee against him under sec. 7 of the Presidency-towns Insolvency Act (Provincial Insolvency Act, sec. 4) to recover from him property alleged to belong to the insolvent (n1), or against a mortgagee on an application by him under r. 18 of Schedule II to the Presidency-towns Insolvency Act (n2), or against beneficiaries in a suit by the Official Assignee or Receiver against the

(k) (1927) 2 Ch. 85, 87; *Re Jawett* (1929) 1 Ch. 108.

(l) *Re Atherton* (1912) 2 K. B. 251; *Re Paget* (1927) 2 Ch. 85, 87. See the Indian Evidence Act, 1872, s. 132. The insolvent is also bound to answer all questions relating to a "secret process": *Re Stevenson* (1918-19) B. & C. R. 106; *Re Keene* (1922) 2 Ch. 475.

(ll) *Re A Solicitor* (1890) 25 Q.B.D. 17.

(m) *Motilal v. Emperor* (1928) 32 C. W. N. 1140, 113 I. C. 851, ('29) A. C. 80. See *Re Joseph Perry*

(1919) 46 Cal. 996, 54 I. C. 478, a case under the P.-t. I. A., s. 36. As to English law, see B.A., 1914, s. 166.

(m1) *New Prance and Garrard's Trustee v. Hunting* (1897) 1 Q.B.D. 607.

(n) *Re Brunner* (1887) 19 Q. B. D. 572.

(n1) *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1925) 30 C. W. N. 346, 93 I. C. 834, ('26) A. C. 597.

(n2) *Jarwa Bai v. Pitambar* (1916) 24 Cal. L. J. 149, 36 I. C. 689.

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insolvent and his co-trustees to set aside a transfer made by the insolvent of his property to the trust estate to make good breaches of trust committed by him (n3), or against creditors in a suit by them under sec. 53 of the Transfer of Property Act, 1882, to set aside a transfer made by the insolvent (n4), or in a proceeding by the Official Assignee or Receiver to set aside a voluntary transfer or a fraudulent preference (n5). Nor are they evidence against the Official Assignee as representing the estate of the insolvent (n6), or against a person adjudged insolvent along with him (n7).

Where the insolvent is called as a witness as to any matter arising in his insolvency, it is open to any party, including the party calling him, to elicit from him in cross-examination what account he has given of the matter in his public examination (n8).

286. Notes of examination.—The notes of the examination are to be taken down in writing and they are to be read over either to or by the insolvent, and may thereafter be used as evidence against him. If the notes are not read over to or by the insolvent or are not signed by him, they cannot be used as evidence against him; but this does not exclude other ways of proving the insolvent's admissions made at his examination. The admissions may be proved by the oral evidence of the person who took the notes (o).

287. Application for examination when to be made.—An application for the public examination of the insolvent must be made before the insolvent applies for his discharge. Except in special circumstances applications made after the petition is placed on the board for final hearing should not be allowed (p).

5. Duties of Insolvent.

288. Duties of insolvent as to discovery and realisation of property (s. 33).—Every insolvent must, unless prevented by sickness or other sufficient cause, attend any meeting of his creditors which the Official Assignee may require him to attend, and submit to such examination and give such information as the meeting may require.

The insolvent must give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, wait at such times and places on the Official Assignee or special manager execute such powers-of-attorney, transfers and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be required by the Official Assignee or special manager or may be prescribed by the Rules or be directed

- (n3) *New Prance and Garrard's Trustee v. Hunting* (1897) 2 Q.B. 19.
 (n4) *Luchiram v. Radha* (1922) 49 Cal. 93, 66 I. C. 15.
 (n5) *Re Brunner* (1887) 19 Q.B.D. 572.
 (n6) *Re Bottomley* (1899) 84 L.J.K.B. 1020; *Luchiram v. Radha* (1922) 49 Cal. 93, 66 I. C. 15.
 (n7) *Luchiram v. Radha* (1922) 49 Cal.

- 93, at pp. 97-98, 66 I.C. 15.
 (n8) *Re Cunningham* (1899) 6 Mans. 199, 80 L.T. 503.
 (o) *R. v. Erdheim* (1896) 2 Q. B. 260; *Re Joseph Perry* (1919) 40 Cal. 996, 998, 999, 54 I. C. 478.
 (p) *Re Fardunji Dadabhoi Daruvala* (1924) 26 Bom. L. R. 627, 83 I. C. 782, ('24) A. B. 542.

by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the Official Assignee or special manager, or any creditor or person interested. The insolvent must aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.

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If the insolvent wilfully fails to perform the duties imposed upon him by the section, or to deliver up possession to the Official Assignee of any part of his property, which is divisible amongst his creditors under the Act and which is for the time being in his possession or under his control, he will in addition to any other punishment to which he may be subject, be guilty of a contempt of Court and may be punished accordingly.

289. Insolvent to execute transfers of his property.—Where the insolvent is personally within the jurisdiction of the Court, he may be ordered to execute a conveyance of his property, though it may be situate outside British India. The reason is that the property of the insolvent *wherever situate* vests in the Official Assignee under the Presidency-towns Insolvency Act (q).

290. Insolvent to aid Official Assignee.—The insolvent is bound to aid to the utmost of his power in the realization of his property. He cannot, however, be compelled to work and earn money for the benefit of the creditors (r). He cannot be called upon to plough his farm or to ride his horse or show his goods in the event of the Official Assignee or Receiver requiring him to facilitate and improve a sale of his goods (s). Nor is he bound to submit to a medical examination to enable the Official Assignee or Receiver to effect an insurance on his life for the purpose of making saleable an asset forming part of his estate (t). In *Board of Trade v. Block* (u) the principal asset to which the bankrupt was entitled was a reversionary interest in a legacy of two thousand pounds contingent upon his surviving his mother. The bankrupt's age was about twenty-four and his mother's about sixty-eight. The trustee in bankruptcy had an offer from an insurance company for a purchase of this reversion conditional on the bankrupt passing a medical examination with a view to a policy on his life being effected. The trustee requested the bankrupt to submit to a medical examination, but the bankrupt refused to do so without giving any reason. The bankrupt afterwards applied for his discharge, but it was opposed on the ground that the bankrupt had refused to submit to a medical examination and to that extent he had failed to aid the trustee in the realisation of his property. It was held that the refusal to submit to a medical examination was not a ground upon which the bankrupt's discharge could be refused or suspended. The insolvent, however, is bound to disclose to the Official Assignee secret formulas for the manufacture of articles although they have never been committed to writing and exist only in his brain. Such formulas are "property" within the meaning of the section (v).

(q) See P.-t. I. A., s. 17.

(r) *Re Jones* (1891) 2 Q. B. 231, 232.

(s) *Board of Trade v. Block* (1888) 13 App. Cas. 570, 575.

(t) *Re Garnett* (1885) 10 Q. B. D. 698 ;

Board of Trade v. Block (1888)

13 App. Cas. 570. See *Re Jones* (1890) 24 Q.B.D. 589, 595.

(u) (1888) 13 App.Cas. 570.

(v) *Re Keene* (1922) 2 Ch. 475.

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291. Committal for contempt.—If the insolvent wilfully fails to perform any of the duties mentioned above, *e.g.*, to wait on the Official Assignee, where and when required by him, he is guilty of contempt of Court and liable to be punished for it. It is not necessary, to render him liable for contempt, that the Official Assignee should have applied to the Court for an order for the insolvent's attendance or that the order should be in writing or that it should have contained a notice that unless he complied with it he would be committed for contempt, though it is desirable to take these steps before committing him. The offence is complete immediately the Official Assignee's directions are disobeyed (*w*).

292. Committal after discharge.—The discharge releases the insolvent only from debts provable in insolvency, and not from the obligation to perform the duties prescribed by the Act during insolvency. The insolvent may therefore even after his discharge be committed for contempt if he wilfully fails to deliver up possession to the Official Assignee of any part of his property which is divisible among his creditors (*x*).

6. *Arrest of insolvent.*

293. Arrest of insolvent (s. 34).—The Court may, either of its own motion or at the instance of the Official Assignee or of any creditor, by warrant addressed to any police-officer or prescribed officer of the Court, cause an insolvent to be arrested, and committed to the civil prison or if in prison to be detained until such time as the Court may order, under the following circumstances, namely :—

- (a) if it appears to the Court that there is probable reason for believing that he has absconded or is about to abscond with a view of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying or embarrassing proceedings in insolvency against him; or
- (b) if it appears to the Court that there is probable reason for believing that he is about to remove his property with a view of preventing or delaying possession being taken of it by the Official Assignee, or that there is probable reason for believing that he has concealed or is about to conceal or destroy any of his property or any books, documents or writings which might be of use to his creditors in the course of his insolvency; or
- (c) if he removes any property in his possession above the value of fifty rupees without the leave of the Official Assignee.

(*w*) *Bhuramull Banka v. Official Assignee of Bengal* (1920) 47 Cal. 56, 56 L. C. 337.

(*x*) *Ex parte Waters* (1874) L. R. 18 Eq. 701.

294. Mode of execution of warrant.—A warrant of arrest may be executed in the same manner and subject to the same conditions as a warrant of arrest issued under the Code of Criminal Procedure, 1898, may be executed (y).

295. Absconding before presentation of petition.—A warrant may be issued for the arrest of a debtor who has absconded even before the presentation of a petition (z).

296. Removal of property without leave of Official Assignee.—A warrant may be issued for the arrest of a debtor for removing his property without the leave of the Official Assignee. The removal need not be with any fraudulent intent.

297. Fraudulent preference.—Any payment or composition made or any security given by a debtor after his arrest by the Insolvency Court under this section, will be deemed to be fraudulent preference within the meaning of sec. 56 of the Presidency-towns Insolvency Act (a).

7 *Redirection of Insolvent's letters.*

298. Redirection of debtor's letters (s. 35).—Where the Official Assignee has been appointed interim Receiver or an order of adjudication is made, the Court, on the application of the Official Assignee, may, from time to time, order that for such time, not exceeding three months, as the Court thinks fit, all post letters, whether registered or unregistered, parcels, and money-orders addressed to the debtor at any place or places mentioned in the order for re-direction, shall be re-directed or delivered by the postal authorities in British India, to the Official Assignee, or otherwise as the Court directs; and the same shall be done accordingly.

299. Who may apply for redirection.—Both before and after adjudication the sole person who may make the application for redirection is the Official Assignee; before adjudication he may do so only if he has been appointed interim Receiver.

8. *Private examination section.*

300. Private examination of insolvent and others [s. 36 (1), (2), (3), & s.37].—(1) The Court has power, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, to summon before it—

- (a) any person known or suspected to have in his possession any property belonging to the insolvent, or
- (b) any person supposed to be indebted to the insolvent, or
- (c) any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.

(y) P.-t. I. A., s. 100 (1).

(z) *R. v. Northallerton County Court Judge* (1898) 2 Q. B. 680, s. c. on appeal *sub. nom. Skinner v.*

Northallerton County Court Judge (1899) A. C. 439.

(a) P.-t. I. A., s. 34 (2).

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The Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

(2) If any person so summoned refuses to come before the Court or to produce any such document without just cause, the Court may issue a warrant for his arrest.

(3) The Court may examine any person so brought before it concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner. The Court has also power under sec. 37 to issue a commission for the examination of any person liable to examination under sec. 36.

301. Previous enactments.—The power to summon witnesses in bankruptcy was originally conferred by 34 and 35 Henry 8, c. 4, s. 2 and was continued by 13 Eliz. c. 7, and subsequent enactments. This section is based on sec. 27 of the Bankruptcy Act, 1883, now Bankruptcy Act, 1914, sec. 25. The corresponding sections of the Bankruptcy Act, 1869, are secs. 96, 97 and 98.

302. Object of private examination.—Besides the public examination of the insolvent (b) the Court has the power to summon the insolvent before it and to examine him respecting his dealings and property. The Court has also the power to summon any other person known or suspected to have in his possession any of the insolvent's property, or to be indebted to the insolvent, or to be capable of giving information about the insolvent, his dealings or property, and to examine him. This examination is held in private by the Court or its officer (c). Its object is to enable the Court to obtain information as to the insolvent's property. "It is of the utmost importance that the trustee in bankruptcy should have this power of investigating all matters relating to the estate which he is called upon to administer, much of which might often be lost to the creditors, if he were compelled to rely only upon such information as the bankrupt may be able or willing to give, or as he can ascertain from persons ready to assist him voluntarily. Without it, he would frequently be compelled to choose between abstaining from insisting upon a claim to property to which he is probably entitled, and commencing proceedings without knowing whether they are justified by the facts" (d). An examination under this section is in many cases the first step to a litigation hostile to the witness.

303. Who may apply for examination.—The application for examination may be made by the Official Assignee or any creditor who has proved his debt. The application should set out fully the object with which the examination is sought (d1). The expression "a creditor who has proved his debt" means a creditor who has lodged or tendered his proof as required by law. It is not also necessary that his proof should have been

(b) P.-t. I. A., s. 27; Prov. I. A., s. 24

(2), (3) and (4).

(c) *Re Whicher* (1888) 5 Morr. 173.

(d) *Wace on Bankruptcy*, p. 84.

(d1) *Re A. F. Seldana* (1929) 33 C.W.N. 679.

admitted (e). When the application is made by the Official Assignee, it should be readily granted. When the creditor makes the application, he is bound to show a *prima facie* probability that some benefit will result to the estate or to the general body of creditors from the proposed examination (f). Under special circumstances a creditor may be summoned for examination on the application even of the insolvent (g).

304. Order may be made *ex parte*.—An order for the examination of a witness may be made *ex parte* unless it is otherwise provided by Rules made under the Act (h). The person so summoned is entitled, as of right, to appear by counsel and after giving notice to the other side to object to the order on the ground that it was erroneously made (i).

305. Who may be present at the examination.—The examination under this section is held in private before the Court or its officer (j). When a witness is examined under this section, the insolvent has no right to be present (k). Also it would seem that even a creditor has no right to attend the examination without leave (l).

306. Scope of the inquiry.—The power of examination vested in the Court by this section is not merely a formal one. It enables the Court to examine the witness usefully and to sift the matter in hand so far as may be necessary for the information of the Court and as the Court may require (m).

An examination under this section is in the nature of a secret proceeding (n). It is not a proceeding in the nature of a litigious proceeding between two parties. A witness summoned for examination under this section is not in the ordinary position of a witness called by a litigant party in order that he may be examined by the two litigant parties before the Court, but he is, so to speak, the witness of the Court. No doubt it has been the common practice, and, indeed, a convenient one, to allow the counsel or other representative of the Official Assignee to put the questions, but still the conduct of the examination rests with the Court (o). To talk of examination-in-chief, or cross-examination, or re-examination in cases of this kind, is to use terms which are really not applicable. The whole object is to get information in order to see what course ought to be followed by the Official

(e) *Sailendra Krishna Roy v. Rashmohan Shaha* (1929) 33 C. W. N. 709, ('29) A.C. 703, dissenting from *Re Abdul Samadi* (1922) 26 C. W. N. 744, 10 I.C. 468, ('23) A.C. 305. See as to mode of proof P.-t. I. A., sch. II, r. 2.

(f) *Re Alladinbhoj Habibhoj* (1887) 11 Bom. 61; *Ex parte Nicholson* (1880) 14 Ch. D. 243; *Haji Dada Nurmahomed v. Ismail Karim* (1929) 31 Bom. L. R. 420, 118 I. C. 794, ('29) A. B. 230.

(g) *Ex parte Austin* (1876) 4 Ch. D. 13.

(h) *Re Kisoory Mohan Roy* (1916) 20 C. W. N. 1155, 36 I. C. 990; *Sukhlal v. Official Assignee of Calcutta* (1921) 34 Cal. L. J. 355,

66 I. C. 890, ('21) A. C. 150.

(i) *Re Maneckji Cawasjee* (1906) 8 Bom. L. R. 85; *Sailendra Krishna Roy v. Nabin Chandra* (1929) 33 C. W. N. 21, ('28) A. C. 786.

(j) *Re Whicher* (1888) 5 Morr. 173. See P.-t. I. A., s. 6.

(k) *Re Beall* (1924) 2 Q. B. 135.

(l) See *Re Norwich Fire Insurance Co.* (1884) 27 Ch. D. 515, a case under s. 115 of the English Companies Act, 1862.

(m) *Re Scharrer* (1888) 20 Q. B. D. 518, 522.

(n) *Leaoyd v. Halifax Joint Stock Banking Co.* (1893) 1 Ch. 686, 692.

(o) *Re Scharrer* (1888) 20 Q. B. D. 518, 522.

Para. 306 Assignee with reference to some matter or claim in the insolvency (*p*). In a recent Rangoon case it was held that the Official Assignee had no right, since the amendment of sub-secs. (4) and (5) of this section, to apply for the examination of a person known or suspected to have in his possession any property belonging to the insolvent for the purpose of obtaining from him the proof of the case which the Official Assignee has to establish (*p1*). This decision, it is submitted, is erroneous. It ignores the distinction between the power of the Court to examine a person supposed to be indebted to the insolvent or suspected to be in possession of the property of the insolvent under sub-secs. (1) to (3) of the section and the power to direct such person to pay to the Official Assignee the amount in which he is found to be indebted to the insolvent or to deliver to the Official Assignee any property belonging to the insolvent of which such person may be in possession under sub-secs. (4) and (5). The amendment deals only with the latter power, and not the former. The Court has no power after the amendment to direct payment or delivery of property to the Official Assignee unless the person examined *admits* that he is indebted to the insolvent or that he has in his possession any property belonging to the insolvent. But this does not affect the power of the Court to *examine* a person under sub-secs. (1) to (3) with the object of eliciting information from him as regards the property of the insolvent and using that information against him in a proceeding for recovering possession of that property from him. The power to examine is indispensable for the realisation of the property of the insolvent and it has recently been extended to Courts in the mofussil by the Provincial Insolvency (Amendment) Act XXXIX of 1926.

The examination may go as far as the Court considers necessary in order to bring out the real facts of the case (*q*), and the witness must answer all questions so long as they relate to the insolvent, his dealings or property. The questions need not relate *directly* to the insolvent's property (*r*). A witness, however, cannot be required to furnish an account in writing not on oath of dealings between him and the insolvent (*s*).

Where an examination is being conducted under this section, it is the duty of the Court to exercise some control over the persons who are conducting it. If the questions put to the witness are such as ought not to be put or are clearly irrelevant or calculated to mislead the witness, it is the duty of the Court to intervene (*t*). The witness may refuse to answer questions put to him on the ground that they are improper, and it is for the Court to decide whether the questions are proper or not. Where the examination is being conducted before an officer of the Court, and the witness refuses to answer on the ground that the question is improper, the officer should report the refusal to the Court, and the Court will decide whether the witness should be compelled to answer the question or not (*u*). A person examined

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| <p>(<i>p</i>) <i>Leary v. Halifax Joint Stock Banking Co.</i> (1893) 1 Ch. 686, at pp. 692-693.</p> <p>(<i>p1</i>) <i>In the matter of G. H. Ghanchee & Sons</i> (1929) 7 Rang. 675.</p> <p>(<i>q</i>) <i>Re Scharrer</i> (1888) 20 Q. B. D. 518, 522.</p> <p>(<i>r</i>) <i>Ex parte Vogel</i> (1818) 2 B. & Ald. 219, 106 E. R. 347.</p> | <p>(<i>s</i>) <i>Ex parte Reynolds</i> (1882) 21 Ch. D. 601.</p> <p>(<i>t</i>) <i>Re Pennington</i> (1888) 5 Morr. 216, 288; <i>Re Tillett</i> (1890) 7 Morr. 286, 291.</p> <p>(<i>u</i>) <i>Sukhal v. Official Assignee of Calcutta</i> (1921) 34 Cal. L. J. 355, 66 I. C. 890, (21) A. C. 150.</p> |
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as a witness under this section is entitled to all the privileges conferred on a witness by the Indian Evidence Act, 1872, and he cannot be compelled to answer any question which that Act allows him not to answer (v).

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307. Incriminating questions.—The general rule in England is that a witness is excused from replying to any question the answer to which would have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge, penalty or forfeiture. In England it has been held that a mere witness summoned for examination under the corresponding section of the English Bankruptcy Act is entitled to claim the same privilege and he may refuse to answer a question on the ground that his answer would tend to criminate him. The Court, however, must be satisfied that the objection is a genuine one (w). The bankrupt himself, however, being under a personal obligation to make a full disclosure of his property to his creditors, is not entitled to any such protection, but must answer all questions put to him about his property, whatever the consequences to himself may be (x).

In India a witness is not excused from answering any question as to any matter relevant to the matter in issue in any civil or criminal proceeding, upon the ground that the answer to such questions will criminate or may tend directly or indirectly to criminate him, or that it will expose or tend directly or indirectly to expose him to a penalty or forfeiture of any kind; but it is provided that no answer which the witness has been compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. This is the rule laid down in sec. 132 of the Indian Evidence Act, 1872. It may be observed that the law in India was at one time the same as that in England, and a witness in India was entitled to the same privilege as a witness in England. This privilege was taken away in India by sec. 32 of Act II of 1855, which is identical with sec. 132 of the Indian Evidence Act. Such being the general rule of evidence in India, a witness examined under sec. 36 of the Presidency-towns Insolvency Act will not be excused from answering any question on the ground that it would tend to criminate him (y). As regards the insolvent himself, the rule in India is the same as that in England and an insolvent is bound to answer all questions relating to his conduct, dealings or property, even though the answer may criminate him (z).

308. When answers may be used against person giving them.—As in England so in India answers given by a witness at his private examination under this section are evidence against him. They are not merely evidence against him in any insolvency proceeding; they are evidence against him in any civil proceeding, whether in insolvency or whether in

(v) *Re Vijayarangam Naidu* ('29) A. M. 183, 114 I. C. 836.

(w) *Ex parte Schofield* (1877) 6 Ch. D. 230; *Ex parte Reynolds* (1882) 20 Ch. D. 294; *Ex parte Gilbert* (1886) 3 Morr. 223.

(x) *Ex parte Schofield* (1877) 6 Ch. D.

230.

(y) *Sukhlal v. Official Assignee of Calcutta* (1921) 34 Cal. L. J. 355, 361, 66 I. C. 890, ('21) A. C. 150.

(z) *Re Joseph Perry* (1919) 46 Cal. 996, 1000, 54 I. C. 478.

Para. 308 a civil suit, on the general principle, namely, that "any statement made by a man on oath may be used against him as an admission." Thus evidence given by a witness under this section may be used against him in a subsequent proceeding under sec. 7 of the Act for recovery of property in his possession and alleged to belong to the insolvent (a).

In England answers given by a bankrupt at his private examination are admissible as evidence against him in a criminal charge. It has thus been held that evidence given by a bankrupt under the corresponding sec. 97 of the Bankruptcy Act, 1869, may be used against him in a subsequent indictment for obtaining property on credit under the false pretence of dealing in the ordinary way of his trade (b). In India there is a conflict of opinion whether a deposition of an insolvent examined under this section is admissible as evidence against him in a criminal charge. In *Re Joseph Perry* (c), it was held by Rankin J. that it is, and this decision was upheld in appeal (c1). The offences with which the insolvent was charged in that case were some of those mentioned in sec. 103 of the Presidency-towns Insolvency Act. On the other hand, it was held in a later Calcutta case that the deposition of an insolvent under this section could not be admitted in evidence against him in a criminal charge (d). In that case also the insolvent was charged with similar offences. No reference was made to *Joseph Perry's* case. The Court seems to have proceeded on an erroneous assumption that there was a distinction in this respect between a public examination under sec. 27 of the Act and a private examination under sec. 36. This decision, it is submitted, is erroneous. The correct view is the one taken in *Joseph Perry's* case.

In England a change was introduced by sec. 166 of the Bankruptcy Act, 1914. That section provides that a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in sec. 85 of the Larceny Act, 1861, now the Larceny Act, 1916, sec. 43, sub-sec. (3). The above rule was first introduced by sec. 27 of the Bankruptcy Act, 1890. The offences referred to in sec. 43 of the Larceny Act, 1916, are those specified in secs. 6, 7 (1), 20, 21 and 22 of that Act. Sec. 6 relates to larceny of wills, sec. 7 (1) to larceny of other legal documents, sec. 20 to fraudulent conversion of property by an agent for sale, sec. 21 to conversion by trustees, and sec. 22 to frauds committed by factors. This, however, is the only protection given to a person giving evidence in bankruptcy proceedings. It still "leaves him exposed to conviction on his own evidence of any of a great number of offences, and notably of bankruptcy offences which are the most likely to be disclosed. Even in the case of those crimes to which the

- (a) *Ex parte Hall* (1882) 19 Ch. D. 580, 582, 583; *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1925) 30 C. W. N. 346, 353, 93 I. C. 834, ('26) A. C. 597.
 (b) *Reg. v. Widdop* (1872) 27 L. T. 693.
 (c) (1919) 46 Cal. 996, 54 I. C. 478.

- (c1) *Joseph Perry v. Official Assignee of Calcutta* (1920) 47 Cal. 254, 56 I. C. 778.
 (d) *Moti Lal v. Emperor* (1928) 32 C. W. N. 1140, 113 I. C. 851, ('29) A. C. 80.

protection applies there is nothing to prevent a conviction of a person on *other* evidence of an offence which he has been compelled to disclose for the first time in an examination in bankruptcy and which but for this would have remained unknown" (e).

309. Examination after discharge of insolvent.—It has been held that a witness may be examined under this section even after the discharge of the insolvent though it may be that no order will be made under this section for the examination of the insolvent himself in view of the provisions of sec. 43 of the Act which impose a duty on a discharged insolvent to assist the Official Assignee in the realisation and distribution of his property (f).

310. Examination when may be refused.—The exercise of the power to examine a witness under sec. 36 is entirely discretionary on the part of the Court (g). Examination of a witness for an indirect purpose will not be allowed. In the absence of special circumstances, such as refusal to give reasonable information, examination of a person *against whom an action is pending* will be refused (h). In *Sarat Kumar Ray v. Nabin Chandra* (i), a person claiming to be a mortgagee of the insolvent's property was examined under this section relating to his mortgage. The Official Assignee having refused to admit the mortgage, he brought a suit against him and the mortgagor to enforce the mortgage, and the suit was decreed *ex parte*. Subsequently the Official Assignee brought a suit against the mortgagee to set aside the *ex parte* decree, but the suit was dismissed. The Official Assignee appealed from the decree, and while the appeal was pending, one of the creditors applied for and obtained an order for the further examination of the mortgagee in connection with the mortgage. It was held by a Full Bench of the High Court of Calcutta that the order ought not to have been made. In the course of his judgment Rankin, C.J., said: "Powers under sec. 36 of the Act are not to be used *when parties are in litigation* as an extra method of discovery in addition to the ample facilities for discovery enjoyed by ordinary litigants under the Code of Civil Procedure. It has been held under a corresponding section of the English Acts that while the trustee will be allowed to use the private examination section in order to make up his mind whether it is necessary to litigate or not, to enable him to inform himself whether the circumstances in connection with the debt were such as would entitle him to embark upon a litigation, once he has commenced litigation he must be content as a rule

(e) Ringwood's Bankruptcy Law, 15th ed., p. 70.

(f) *Re Haripada Rakshit* (1916) 44 Cal. 374, 40 I. C. 94.

(g) *Haji Dada Nurmahomed v. Ismail Karim* (1929) 31 Bom. L. R. 420, 118 I. C. 794, ('29) A. B. 230.

(h) *Re Franks* (1892) 1 Q. B. 646; *Re Desportes* (1893) 10 Morr. 40; *Re Bhagwandas Narotamlas* (1898) 22 Bom. 447.

(i) (1929) 56 Cal. 667, 115 I. C. 39, ('28) A. C. 783.

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with the ordinary facilities for discovery and it is too late to urge that he should be allowed to cross-examine his opponent under the private examination section. I do not say that this principle can be regarded as a rigid rule, but it is a rule which has always to be borne in mind. I am bound to say that I have never heard of an examination in the exercise of the powers conferred under the private examination section when a mortgagee who is not bound to come into insolvency at all has brought his suit successfully to realize his security and the Official Assignee as a defendant in that suit has been taking further steps to get the decree set aside." The examination will not be allowed where it is in reality for the benefit of a single creditor only, and not for the benefit of the estate or of the general body of creditors (j).

The examination of a witness ought not to be refused merely because the witness says that the property in respect of which he is to be examined belongs to him, and not to the insolvent (k). Since the object of the section is to enable the Official Assignee or a creditor to obtain information on which proceedings may be taken to impeach fraudulent transactions (l), the examination ought not to be refused merely because litigation may ultimately ensue between the Official Assignee and the person sought to be examined (m). Further, the Court may under this section order the examination of a person, even though the professed object of the Official Assignee is to enable him to obtain evidence to set aside a transaction between the insolvent and such person (n). In fact, that is the whole object of the section. See para. 306 above.

310A. Purdanashin lady.—A purdanashin lady may be summoned under this section, though she should be examined in a private room and not in open Court (o).

311. Professional assistance for insolvent and witnesses.—The insolvent or any other person examined under this section is entitled to be represented by a legal practitioner (p).

- (j) *Re Easton* (1891) 8 Morr. 168; *Re Desportes* (1893) 10 Morr. 40; *Haji Dada Nurmahomed v. Ismail Karim* (1929) 31 Bom. L. R. 420, 118 I. C. 794, ('29) A. B. 230.
- (k) *Re Vijiarangam Naidu* ('29) A.M. 183, 114 I.C. 836.
- (l) *Abdul Khader v. Official Assignee* (1917) 40 Mad. 810, 36 I. C. 524.
- (m) *Re Haripada Rakshit* (1917) 44 Cal. 374, 40 I. C. 94.
- (n) *Ex parte Eckersley* (1883) 48 I.L.T. 832.
- (o) *Re Bilasroy Serowgee* (1929) 50 Cal. 865 ('29) A. C. 528.
- (p) The practice followed under the I.L.A., 1848, was different.

Under that Act, if the person summoned for examination was one who was suspected to have in his possession property belonging to the insolvent, he was entitled to be represented by counsel: *In the matter of the Petition of Nolimohan Dass* (1873) 11 Bengal L.R. App. 33. But a mere witness summoned for examination was not entitled as of right to be represented by counsel: *In the matter of Nursey Kessowji* (1879) 3 Bom. 370; *In the matter of Chuni Lal Oswal* (1902) 29 Cal. 507.

312. Persons residing more than 200 miles from Court-house. Para. 312

—In a Bombay case under sec. 26 of the Indian Insolvency Act, 1848, it was held that the Insolvent Debtors Court at Bombay had jurisdiction to make an order under that section against a person residing at Amritsar (outside the Bombay Presidency) to deliver to the Official Assignee of Bombay the property of the insolvent of which he was in possession (g). A similar order was made in *Re Naoroji Sorabji Talati* (r) where the person in possession of the insolvent's property resided and carried on business at Shanghai. In the same case an application was made on behalf of the opposing creditors under sec. 36 of the Indian Insolvency Act, 1848, for the examination of a witness residing at Shanghai. The Court refused to direct the witness to come to Bombay for examination on the ground that there was no machinery for the purpose, and directed a commission to issue to Shanghai for his examination. In yet another Bombay case under sec. 58 of that Act, it was held that the High Court of Bombay had jurisdiction to order the attendance for examination of the insolvent who was then residing at Aligarh in the United Provinces. The reason given was that he was adjudged insolvent on his own petition by the Bombay Court, and he must therefore be deemed to have submitted himself to the jurisdiction of the Court, and the Court had, therefore, power to summon him before it for examination (s). If I have called attention to the decisions under the Indian Insolvency Act, 1848, it is only for the purpose of uttering a caution against accepting them as a guide to the determination of questions arising under the section now under consideration. This section is not a counterpart either of sec. 26 or sec. 36 of the Indian Insolvency Act, and cases decided under those sections afford no assistance in determining the powers of the Court under the present section (t).

It has been held by the High Court of Calcutta that the Court has jurisdiction under this section to summon a witness before it for examination, though he may be residing more than 200 miles from the Court-house. The person summoned for examination in that case resided at Darjeeling, and it was contended that the Court had no power to summon before it persons who resided more than 200 miles from the Court-house, and reliance was placed on sec. 90, sub-sec. (1), of the Presidency-towns Insolvency Act and O. 16, r. 19, of the Code of Civil Procedure, 1908. Sec. 90, sub-sec. (1), provides that in proceedings under the Presidency-towns Insolvency Act, the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction

(g) *Re Ganeshdas Panalal* (1908) 32 Bom. 198; *Official Assignee of Bombay v. Registrar, Small Cause Court, Amritsar* (1910) 37 I. A. 86, 37 Cal. 418, 6 I. C. 273.
(r) (1909) 33 Bom. 462, 3 I. C. 987.

(s) *Re Cawasji Ookerji* (1889) 13 Bom. 114.

(t) *Re Jnanendra Bala Debi v. The Official Assignee of Calcutta* (1925) 30 C.W.N. 346, 354-355, 93 I.C. 834, (26) A. C. 597.

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with a proviso that nothing in the sub-section is in any way to limit the jurisdiction conferred on the Court under the Act. O. 16, r. 19, of the Code exempts a witness from personal attendance unless he resides within the local limits of the Court's original jurisdiction or within 200 miles. It was held that sec. 36 deals with discovery of the insolvent's property rather than with the ordinary testimony which a witness can give. It was also held that the proviso to sec. 90, sub-sec. (1), of the Presidency-towns Insolvency Act made it clear that that section was not intended to fetter the Court in the exercise of its jurisdiction under sec. 36 by any limitation imposed by the Code of Civil Procedure (*w*). In a Madras case the person to be examined was supposed to be indebted to the insolvent and he resided more than 200 miles from the Court-house. It was held that as the person to be examined was not a mere witness, the Court had the power to summon him for examination (*v*). The Court apparently drew a distinction between the case of a mere witness summoned for examination and a person believed to be indebted to the insolvent or to be in possession of property belonging to the insolvent. It is submitted that the proper course to follow, where a person to be examined resides more than 200 miles from the Court-house, is to issue a commission for his examination, whether he is a mere witness summoned for examination or a person believed to be indebted to the insolvent or to have in his possession property belonging to the insolvent, unless there are special reasons for requiring his attendance before the Insolvency Court. Sec. 37 of the Presidency-towns Insolvency Act empowers the Court to issue a commission for the examination of any *person liable to examination under sec. 36*.

313. Expenses of witness.—A witness summoned for examination is entitled to have travelling and boarding expenses, but not the costs of employing a solicitor or counsel (*w*). Unless travelling and boarding expenses are tendered, he cannot be committed for not attending nor can a warrant issue to compel his attendance (*x*).

314. Production of documents.—The Court may require a person under this section to produce any document in his custody or power relating to the insolvent, his dealings or property. The Court will not order the production of a document unless a strong *prima facie* case is made out that it relates to the dealings or property of the insolvent (*y*). A mortgagee or purchaser from the debtor must, if required, produce his mortgage or purchase deed (*z*). A witness who is a mere servant, and has no authority

(*u*) *Re Dinaram Somani* (1923) 27 C. W. N. 370, 82 I. C. 76, ('23) A. C. 427.

(*v*) *In the matter of Abdul Rahim Sahib and Co.* (1928) 54 Mad. L. J. 715, 110 I. C. 606, ('28) A. M. 856.

(*w*) *Ex parte Waddell* (1877) 6 Ch. D. 328; *In the matter of Anshu Pro-*

kash Ghose (1919) 46 Cal. 785, 53 I. C. 362.

(*x*) *Re Batson* (1894) 70 L. T. 382.

(*y*) *Ex parte Smith* (1881) 45 L. T. 447.

(*z*) *Ex parte Caldecott* (1830) Mont. 55; *Re Marks' Trust Deed* (1866) L. R. 1 Ch. App. 429.

from his master to produce documents cannot be compelled to produce them (a).

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Wilful disobedience of an order to produce documents may be followed by an order of committal (b). In view of this possibility, the Court should act with great caution, and every opportunity should be given to the person sought to be committed to satisfy the Court that when the order was made the books were either not in existence or were not under his control (c).

9. *Order for payment and delivery of property.*

315. Order for payment and delivery of property [s. 36 (4)-7].—Sec. 36, sub-sec. (4) gives power to the Court, if the person examined admits that he is indebted to the insolvent, to order him to pay to the Official Assignee the amount in which he is indebted. Sub-sec. (5) empowers the Court, if the person examined admits that he has in his possession property belonging to the insolvent, to order him to deliver the property to the Official Assignee. If the person examined disputes his liability, the Court has no power to make any order under sec. 36, but the question whether such person is indebted to the insolvent or whether he has in his possession any property belonging to the insolvent may be determined by the Court on an application or a notice of motion under sec. 7, if all the parties consent thereto (d). If the parties do not consent, the only course left open to the Official Assignee is to enforce his claim by a suit before an ordinary tribunal. This has been the law since the amendment of sec. 36 in 1927. To appreciate the importance of the amendment it is necessary to know what the law was before the amendment.

As has already been stated, sec. 36 is based on sec. 27 of the Bankruptcy Act of 1883. In one respect, however, there was a departure from the English Act, for while under the English section an order for payment or for delivery of property could be made only if the person examined by the Court *admitted* his liability, under sub-secs. (4) and (5) of sec. 36, as they stood before the amendment, the Court had the power to make an order for payment of money or for delivery of property if, on the examination of any person summoned before it, the Court was *satisfied* that he was indebted to the insolvent or that he had in his possession property belonging to the insolvent. This difference in the wording, however, was held not to constitute any material departure from the English law, and it was accordingly laid down in a series of cases that the section was intended to provide a

(a) *Re Higgs* (1892) 66 L. T. 296.

(b) *Origanti v. Venkatarathaman Desikachari* (1919) 36 Mad. L. J. 461, 52 I. C. 448.

(c) *Sukhlal v. Official Assignee* (1921) 34 Cal. L. J. 351, 66 I. C. 890, (21) A. C. 150.

(d) See the proviso to s. 7 of P.-t. I. A.

Para. 315 summary procedure for ordering payment of debts due to the insolvent and delivery of property belonging to the insolvent where the person examined by the Court either admitted that he was indebted to the insolvent or that he had in his possession property belonging to the insolvent, or, even if he did not make an actual admission, it was quite clear from his evidence that he was indebted to the insolvent or had in his possession property belonging to the insolvent; but that if the person examined by the Court *disputed* the liability, no order could be made under the section. The section, it was held, did not empower the Court to determine any question of title as between the Official Assignee and a stranger to the bankruptcy when the latter set up a title which the Official Assignee desired to call in question, and if the liability was disputed, the proper course for the Official Assignee was either to proceed by way of motion under sec. 7 of the Act as it originally stood or to proceed by way of suit (e). But the course of decisions was not quite uniform, and the Court in some cases assumed jurisdiction to dispose of questions of title under this section even where the liability was denied, and that too on the evidence of persons other than the insolvent (f).

The latest reported case on the subject is *Jnanendra Bala Debi v. Official Assignee of Calcutta* (g). In that case one of the creditors of the insolvent applied for the examination of the insolvent's wife under sec. 36 and she was examined under that section. The examination related to certain property which the insolvent's wife claimed as her own. Afterwards the Official Assignee made an application under sec. 36 for a declaration that the property belonged to the insolvent and for an order that possession of the property be delivered up to him. The trial Judge entertained the application, and after hearing evidence ordered the wife to deliver the property to the insolvent. On appeal it was held that the trial Judge had no power under sec. 36 to make the order and the order was set aside. Thereafter the Civil Justice Committee recommended that the section should be amended and brought into line with the English section, and the section was accordingly amended by Act XIX of 1927 by substituting in sub-secs. (4) and (5) the words "if on his examination any such person *admits*," for the words "if on the examination of any such person the Court is satisfied." The result is that

- (e) *Jnanendra Bala Debi v. The Official Assignee of Calcutta* (1925) 30 C. W. N. 346, 356, 93 I. C. 834, ('26) A. C. 597; *Re Lucas* (1915) 42 Cal. 109, 28 I. C. 469; *Re Suresh Chander Gooyee* (1918) 23 C. W. N. 431, 51 I. C. 654; *Rash Behary Ghose v. Official Assignee of Calcutta* (1920) 25 C. W. N. 852, 68 I. C. 341; *Abdul Khadar Sahib v. Official Assignee of Madras* (1913) 25 Mad. L. J. 308, 20 I. C. 485; *Sornamal v.*

Official Assignee of Madras (1914) 27 Mad. L. J. 66, 24 I. C. 239; *Re Mahomed Ismail Fazla* (1925) 27 Bom. L. R. 551, 88 I. C. 77, ('25) A. B. 329.

- (f) See *Re A. F. C. Seehase* (1917) 22 C. W. N. 335, 46 I. C. 196, and the decision of the trial Judge in *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1925) 30 C. W. N. 346, 93 I. C. 834, ('26) A. C. 597.
- (g) (1925) 30 C. W. N. 346, 93 I. C. 834, ('26) A. C. 597.

no order can now be made under sub-sec. (4) unless the person examined *admits* that he is indebted to the insolvent, and no order can be made under sub-sec. unless the person examined *admits* that he has in his possession property belonging to the insolvent. If no admission is made, the Court may proceed under sec. 7 if both parties agree. If they do not agree, the only course left open to the Official Assignee is to enforce his claim by a suit in the ordinary tribunals.

**Paras.
315-317**

316. Who may apply for order for payment or delivery of property.—No order can be made under sub-secs. (4) and (5) except on the application of the Official Assignee. A creditor is not entitled to apply under these sub-sections. If an order is made on the application of a creditor, in is without jurisdiction, and if an order of committal for non-compliance with such an order is made, it must be set aside (*h*).

317. Matters within exclusive jurisdiction of Revenue Courts.—The jurisdiction exercised by a Judge of the High Court sitting in insolvency is the original civil jurisdiction. He has therefore no power to make any order under sec. 36 (5) in any matter of which cognizance by a civil Court exercising original jurisdiction is barred by any enactment, *e.g.*, the Madras Estates Land Act, 1908 (*i*).

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| <p>(<i>h</i>) <i>Sitaram Khemka v. Haribux Fatchpuria</i> (1926) 30 C. W. N. 914, 98 I. C. 723, ('26) A. C. 1097; <i>In the matter of the estate of P. A.</i></p> | <p><i>Mohamed Ganny</i> (1927) 5 Rang. 375, 104 F.C. 89, ('27) A.R. 284.
(<i>i</i>) <i>Re Chidambara Chetty</i> (1922) 45 Mad. 31, 61 I.C. 991, ('22) A.M. 143.</p> |
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B.—PROCEEDINGS CONSEQUENT ON ORDER OF ADJUDICATION.

PROVINCIAL INSOLVENCY ACT, SS. 28 (1), 31-33, 59A.

1. *Debtor to aid Receiver.*

Paras.
319, 320

319. Debtor to aid Receiver [s. 28 (1)].—On the making of an order of adjudication, the insolvent must aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors. This is dealt with in para. 290 above. This sub-section is entirely out of place in sec. 28. The other sub-sections deal with the *property* of the insolvent. Sub-sec. (1) should therefore be a separate section by itself.

2. *Protection Order.*

320. Protection order (s. 31).—Any insolvent in respect of whom an order of adjudication has been made may apply to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention. A protection order may apply either to all the debts of the insolvent, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit. Such an order protects the insolvent from being arrested or detained in prison for any debt to which such order applies, and any insolvent arrested or detained contrary to its terms is entitled to his release provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled. Any creditor is entitled to appear and oppose the grant of a protection order.

This subject has already been discussed in paragraphs 277-281 above.

Under sec. 16 of the Provincial Insolvency Act, 1907, the insolvent got automatic protection from arrest and imprisonment upon adjudication. If he was in prison, he was to be immediately released, and thereafter no creditor to whom the insolvent was indebted in respect of any debt provable in insolvency had any remedy against the property or *person* of the insolvent during the pendency of the insolvency proceedings. Sec. 16 of the Act of 1907 was replaced by sec. 28 (2) of the Act of 1920. The effect of sec. 28 (2) of the Act of 1920 is to abolish the immunity from arrest conferred by sec. 16 of the Act of 1907. At the same time a new section, being the present sec. 31, was enacted under which an insolvent in respect of whom an order of adjudication has been made may apply for protection from arrest and detention. After admission of the insolvency petition and before adjudication, the debtor, if he is under arrest or imprisonment, may apply to the Court under sec. 23 for his release. An historical review of this subject will be found in para. 256 above. The difference between the provisions of the Presidency-towns Insolvency Act and the Provincial Insolvency Act has been pointed out in sub-para. 3 of para. 256.

3. *Arrest of debtor.*

323. Power to arrest after adjudication (s. 32).—At any time after an order of adjudication has been made, the Court may, if it has reason to believe, on the application of any creditor or the Receiver, that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be, imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent, order his release on such terms as to security as may be reasonable or necessary, or, if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months.

**Paras.
323, 324**

The Court has power under this section at any time during the pendency of the insolvency proceedings to order a warrant to issue for the arrest of the insolvent if it has reason to believe that the insolvent has absconded from the local limits *with intent to avoid any obligation* which has been or might be imposed upon him under this Act. Mere departure from the local limits without any such intent is not sufficient. The obligation referred to in this section would seem to refer to the duty of the insolvent to aid in the realization and distribution of his property mentioned in sec. 28 (1) of the Act. See para. 319 above.

4. *Schedule.*

324. Schedule of creditors (s. 33).—(1) When an order of adjudication has been made under the Provincial Insolvency Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under the Act must tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court must, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amounts of such debts respectively, and must frame a schedule of such persons and debts: provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt must not be included in the schedule.

(2) A copy of every such schedule must be posted in the Court-house.

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under the Act, and not entered in the schedule, and the Court, after causing notice to be served on the Receiver and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application.

**Paras.
325-327**

325. Framing of schedule.—One of the important functions of the Court after an order of adjudication has been made is to frame a schedule of creditors. The schedule is to contain the names of creditors who have proved their debts and the amount of their respective debts. The debts must be debts “provable under the Act” within the meaning of sec. 34. The debts must be proved in the mode prescribed by sec. 49. Under that section the creditor has to deliver, or send by post in a registered letter, to the Court an affidavit verifying the debt. The affidavit must contain particulars of the debt and specify the vouchers, if any, by which they can be substantiated. The Court may admit the proof or reject it, in whole or in part. Before making an order admitting or rejecting the proof, the Court should hear the parties. It may also take the report of the Receiver into consideration, but it cannot make an *ex parte* order merely on the Receiver’s report (j). It is open to any creditor of the insolvent to challenge the validity of a debt set up by another creditor, and if he does so, the Court is bound to inquire into the matter, and should not refer the applicant to a suit (k).

326. Inquiry into consideration of debts.—The debt must be a real debt, that is, a debt for a consideration. The Court, therefore, has the power to inquire into the consideration for the debt. It has the power even to go behind a judgment. “The trustee’s right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against a bankrupt, no covenant given by or accounts stated with him, can deprive the trustee of his right. He is entitled to go behind such forms to get at the truth and the estoppel to which the bankrupt may have subjected himself will not prevail against him” (l). On this principle, when a debt secured by a promissory note is challenged, the Court should inquire into the consideration for the debt. The burden of proving consideration is on the creditor. The presumption under sec. 118 of the Negotiable Instruments Act, 1881, that every negotiable instrument was made or drawn for consideration, is available only against the debtor, and cannot be invoked against the Receiver in insolvency (m).

327. Proof after framing of schedule and before discharge.—A creditor who has not proved his debt when the schedule was framed may tender proof at any time before the discharge of the insolvent. Similarly, a creditor who has already proved one or more debts may tender proof, after the schedule has been framed, of a further debt which for some reason or other

(j) *Amir Chand v. Anukul Chandra*
(‘26) A.C. 160, 90 I.C. 802.

(k) *Khushhali Ram v. Bholar Mal* (1915)
37 All. 252, 28 I.C. 573.

(l) *Per Bigham, J., Re Van Laun*
(1907) 1 K. B. 155, 162-163,

affirmed in *Van Laun v. Chatterton* (1907) 2 K.B. 23.

(m) *Ram Lal Tandon v. Kashi Charan*
(1928) 26 All. L. J. 241, 108 I.C. 147, (‘28) A.A. 380.

he omitted to prove (n). Where proof is tendered after the schedule has been framed, the Court must cause notice to be served on the Receiver and the other creditors who have already proved their debts. If the Court admits the proof without giving the requisite notice, the order will be set aside on appeal (o). Under the section before it was amended by Act XXXIX of 1926, notice had to be served on the insolvent. If the insolvent was dead, his heirs, it was held, were entitled to the notice (p). The word "Receiver" was substituted for the word "insolvent" by that Act. The amendment is in accordance with the principle of the English Law that the bankrupt himself has no *locus standi* to litigate with proving creditors as to the amount of their debts.

Paras.
327-329

328. Proof of debts after discharge.—Sub-sec. (3) provides that any creditor may, at any time before the discharge of the insolvent, tender proof of his debt. This does not mean that a creditor is precluded after the discharge of the insolvent from proving his debt. The Act does not prescribe any period of limitation for an application by a creditor to prove his debt (q). As regards proof of debts in insolvency the rule is that a debt which is barred at the commencement of the insolvency is not provable, but if the debt was not barred at the commencement of the insolvency, lapse of time will not deprive the creditor of his right of proof (r). A creditor, therefore, may tender proof of his debt at any time so long as there are assets available for distribution, even after an order of discharge, but so as not to disturb the distribution of any dividend already declared (s). In a Madras case proof was allowed about twelve years after the insolvency (t). In a Rangoon case a creditor applied to prove his debt five years after the insolvency; the application, however, was refused as no explanation was given for the delay (u). It has been held that the term "discharge" in sub-sec. (3) means an absolute, and not a conditional discharge (v). But these decisions are of doubtful authority. An order of discharge is none the less a discharge because conditions are attached to it.

329. Delegation of power to Official Receiver.—Sec. 80 provides *inter alia* for the delegation to the Official Receiver of the power to frame

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| <p>(n) <i>Gokul Chandra Raj v. Radha Govinda Shaha</i> (1926) 44 Cal. L. J. 108, 97 I.C. 1013, ('26) A.C. 1210.</p> <p>(o) <i>Allahabad Bank Ltd., Cawnpore v. Murlidhar</i> (1912) 34 All. 442, 14 I. C. 589.</p> <p>(p) <i>Sripal Singh v. Prodyat Kumar Tagore</i> (1921) 48 Cal. 87, 57 I. C. 810, ('21) A. C. 219.</p> <p>(q) <i>Baranashi Koer v. Bhabhadeb</i> (1921) 34 Cal. L. J. 167, 170, 66 I. C. 758, ('21) A. C. 450; <i>Jhan Bahadur v. Bailiff District Court, Toungoo</i> (1927) 5 Rang. 394, 104 I.C. 816, ('27) A.R. 263.</p> | <p>(r) <i>Ex parte Ross</i> (1827) 2 Gl. & J. 330.</p> <p>(s) <i>Re McMurdo</i> (1902) 2 Ch. 64, 699; <i>Sivasubramania Pillai v. Theethiappu Pillai</i> (1923) 47 Mad. 120, 75 I.C. 572, ('24) A.M. 163; <i>Babu Lal Sahu v. Krishna Prashad</i> (1925) 4 Pat. 128, 85 I. C. 543, ('25) A.P. 438.</p> <p>(t) (1923) 47 Mad. 120, 75 I.C. 572, ('24) A. M. 163, <i>supra</i>.</p> <p>(u) (1927) 5 Rang. 384, 104 I.C. 816, ('27) A.R. 263, <i>supra</i>.</p> <p>(v) (1923) 47 Mad. 120, 75 I.C. 572, ('24) A.M. 163, <i>supra</i>; (1925) 4 Pat. 128, 85 I. C. 543, ('25) A. P. 438, <i>supra</i>.</p> |
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**Paras.
329-331**

schedules and to admit or reject proofs. Where such power is delegated the schedule will be framed by the Official Receiver (*w*). In all other cases the schedule must be framed by the Court. A Receiver other than an Official Receiver has no power to frame it (*x*).

330. Effect of omission to prove debt.—Under sec. 45 of the Provincial Insolvency Act, 1907, an order of discharge released the insolvent only from *debts entered in the schedule*. The result was that a creditor who did not choose to prove his debt and to have it entered in the schedule was not precluded from recovering his claim from the insolvent after his discharge. Under sec. 44, however, of the Act of 1920, an order of discharge releases the insolvent from *all debts provable under that Act* other than those specified in that section. The result is that a creditor whose debt is provable under the Act of 1920, but who has not proved it, is debarred from enforcing his claim against the insolvent after his discharge.

5. *Examination of third persons.*

331. Examination of third persons regarding insolvent's property (s. 59A).—Sec. 59A provides that the Court, if specially empowered in this behalf by an order of the Local Government, or any officer of the Court so empowered by a like order, may, on the application of the Receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in the manner prescribed by the Rules any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court or such officer, as the case may be, may deem capable of giving information respecting the insolvent or his dealings or property, and the Court or such officer may require any such person to produce any document in his custody or power relating to the insolvent or to his dealings on property. If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court or such officer at the time appointed, or refuses to produce any such document, having no lawful impediment made known to and allowed by the Court or such officer, the Court or such officer may, by warrant, cause him to be apprehended and brought up for examination. The Court or such officer may examine any person so brought before it or him concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.

(w) See *Khadirshaw Maraiakar v. Official Receiver, Tinnevely* (1918) 41 Mad. 30, 45 I. C. 67.

(x) *Behary Lal Sikdar v. Harsukh Das Chakmal* (1920) 25 C.W.N. 137, 61 I.C. 904.

Object of the section.—This section is new. It was introduced by Act XXXIX of 1926. It was added on the recommendation of the Civil Justice Committee. It is in almost the same terms as sec. 36, sub-secs. (1), (2) and (3) of the Presidency-towns Insolvency Act. The section was added to enable the Court to examine third persons, who could give information respecting the insolvent or his dealings or property, in a comparatively inexpensive manner. While recommending the insertion of sec. 36, sub-secs. (1), (2) and (3) of the Presidency-towns Insolvency Act in the Provincial Insolvency Act, the Civil Justice Committee observed that it was not desirable to give to Provincial Insolvency Courts the power which Insolvency Courts have under sec. 36, sub-secs. (4) and (5) of the Presidency-towns Insolvency Act. This observation was quite appropriate so far as it related to sub-secs. (4) and (5) as they originally stood. But they have since been amended, and the amendment is of such a nature that it would have been as well to include those sub-sections also in the new sec. 59A of the Provincial Insolvency Act. **Para. 331**

Sec. 36 of the Presidency-towns Insolvency Act provides for the private examination not only of third persons, but also of the insolvent. There is no provision in the present section for the examination of the insolvent. Further, the power to summon and examine under the present section is confined only to such Provincial Insolvency Courts as are specifically empowered in that behalf by an order of the Local Government. There is no such limitation in sec. 36 of the Presidency-towns Insolvency Act. The newly added section will be found of considerable use in realizing the insolvent's property and bringing his affairs to light if it is well worked. The whole subject is considered in paragraphs 300 to 314 above.

LECTURE VI.

PART III.

ANNULMENT OF ADJUDICATION.

Para. 333 333. When adjudication may be annulled.—There are five cases in which an adjudication may be annulled under the Insolvency Acts, namely,—

- A. Where a debtor ought not to have been adjudged insolvent or where after adjudication the debts are paid in full, or where an adjudication is made on a petition presented without leave of the Court where such leave was necessary [P.-t. I. A. s. 21 ; Prov. I. A., s. 35].
- B. Where concurrent proceedings are pending in another Court [P.-t. I. A., s. 22 ; Prov. I. A., s. 36].
- C. Where the Court approves the proposal of the insolvent for a composition or a scheme [P.-t. I. A., s. 30 (1) ; Prov. I. A., s. 39].
- D. Where the insolvent does not appear at the hearing of the application for his discharge or does not apply for his discharge within the time specified by the Court [P.-t. I. A., s. 41 ; Prov. I. A., s. 43 (1)].
- E. Where an insolvency proceeding is pending under the Provincial Insolvency Act in a Court subject to the superintendence of the High Court [P.-t. I. A., s. 18A].

In every case where an adjudication is annulled notice of the order annulling the adjudication must be published in the local official Gazette and in such other manner as may be prescribed by the Rules, and under the Presidency-towns Insolvency Act also in the Gazette of India (a).

The effect of annulment is considered under head F.

(a) P.-t. I. A., s. 23 (3), s. 18A (3) ; Prov. I. A., s. 37 (2).

A.—Power to annul adjudication (i) where it ought never to have been made, (ii) where debts have been paid in full, and (iii) where it was made on a petition presented without leave of the Court. Para. 334

334. Power to annul: case A.—The sections of the two Acts relating to annulment under this head are as follows:—

P.-t. I. A., s. 21.

Prov. I. A., s. 35.

21. (1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court may, on the application of any person interested, by order annul the adjudication and the Court may, of its own motion or on application made by the Official Assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition.

35. Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court *shall*, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication and the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 10, not entitled to present such petition.

(2) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.

Points of difference between the Presidency-towns Insolvency Act and the Provincial Insolvency Act.—The words used in the Presidency-towns Insolvency Act are “may annul,” and the Courts under that Act have a discretion to refuse to annul an adjudication even if the conditions laid down in the section are complied with. There is no such discretion under the Provincial Insolvency Act, the words used in that Act being “shall annul.” Sub-sec. (2) of the section of the Presidency-towns Insolvency Act is not reproduced in the Provincial Insolvency Act, but the same principles, it seems, will apply to cases under the Provincial Insolvency Act.

**Paras.
335-338**

335. Who may apply for annulment.—An application to annul an adjudication under the first part of this section may be made by the debtor, or any creditor, or any other person interested in annulling it, *e.g.*, a mortgagee of the debtor's property (*b*). An application under the second part of the section to annul an adjudication made on the petition of a debtor, where such petition ought not to have been presented without leave, may be made by the Official Assignee or Receiver or any creditor.

336. When adjudication may be annulled.—This section gives power to the Court to annul an adjudication—

- (1) where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent;
- (2) where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full;
- (3) where an order of adjudication has been made on a debtor's petition presented without leave of the Court where such leave was necessary (*c*).

337. (1) Where the debtor ought not to have been adjudged insolvent.—An adjudication may be annulled if it ought never to have been made. An adjudication order made against an infant (*d*); or against a debtor who was dead at the date of the petition (*e*), may be annulled. It may also be annulled if the creditor's petition did not allege a sufficient act of insolvency and the order was made *ex parte* (*f*). It has been held by the High Court of Madras that if a debtor is adjudged insolvent on his own petition on the allegation that he is unable to pay his debts, and the allegation is found to be untrue, the adjudication should be annulled under this section (*g*).

338. (2) Where debts are paid in full.—An adjudication may be annulled if the debts have been paid in full. Payment in full means payment, in cash or the equivalent, to the amount of sixteen annas in the rupee (*h*), together with interest up to the date of payment (*i*). A payment

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| <p>(<i>b</i>) <i>Haji Jackeria Haji Ahmed v. R. D. Sethna</i> (1910) 12 Bom. L. R. 27, 5 I. C. 618, in app. from <i>Re Haji Jan Haji Mahomed</i> (1909) 11 Bom. L. R. 1032, 4 I. C. 126, a case under ss. 9 and 73 of the I. A., 1848; <i>Ex parte Ellis</i> (1876) 2 Ch. D. 797. See also <i>Ex parte Learoyd</i> (1878) 10 Ch. D. 3.</p> <p>(<i>c</i>) See P.-t. I. A., s. 14 (2); Prov. I. A., s. 10 (2).</p> <p>(<i>d</i>) <i>Jagmohan Narain v. Grish Babu</i> (1920) 42 All. 515, 58 I. C. 557; <i>Re A Debtor</i> (1923) 155 L. T. 395.</p> <p>(<i>e</i>) <i>Ex parte Geisel</i> (1882) 22 Ch. D. 436.</p> | <p>(<i>f</i>) <i>Ex parte Coates</i> (1877) 5 Ch. D. 979, 36 L.T. 806; <i>Karuthan Chettiar v. Raman Chetti</i> (1926) 51 Mad. L. J. 474, 98 I.C. 21, ('26) A.M. 1159. See P.-t. I. A., s. 12 (1); Prov. I. A., s. 9 (1).</p> <p>(<i>g</i>) <i>Alamelumangathayarammal v. Balusami</i> ('28) A. M. 394, 108 I. C. 208.</p> <p>(<i>h</i>) <i>Re Keet</i> (1905) 2 K.B. 666; <i>Re Shivalal Rathi</i> (1917) 19 Bom. L. R. 365, 40 I. C. 207.</p> <p>(<i>i</i>) <i>Re Hailes</i> (1920) 47 Cal. 914, 60 I.C. 943; <i>Muhammad Ebrahim v. Ram Chandra</i> (1926) 48 All. 272, 92 I. C. 514, ('26) A.A. 289.</p> |
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of anything less than that is not a payment in full (j). If the debts are not paid in full, the Court should refuse to annul the adjudication, even if all the creditors consent to the annulment (k). An insolvent cannot by settling with his creditors *out of Court* escape the consequences of the adjudication order and prevent an inquiry into his affairs. He cannot by paying less than sixteen annas in the rupee and getting receipts in full contend that his debts have been paid in full and apply for annulment of his adjudication. That can only be done as the result of a composition or scheme of arrangement under the Act (l). Even if all the creditors are paid in full, the Court should not annul the adjudication if the interest due to one of the creditors is not paid though he may assent to the annulment (m).

“Debts” in this section mean debts admitted to proof. To satisfy this section all debts which have been actually and properly proved in the insolvency must be paid. It is not necessary that debts provable in insolvency, but not proved, should also be paid. Where some only of the debts have been paid in full, and others have been released without payment, there is no payment in full (n). Where A, a friend of a bankrupt, bought up all the debts for a sum representing less than two shillings in the pound, and B, another friend of the bankrupt, took an assignment of the debts on behalf of the bankrupt at their full value, it was held that the debts had not been paid in full and the bankruptcy could not be annulled (o). In the course of the judgment Vaughan Williams, J., said: “It is to me perfectly obvious that the whole of these payments were made in the interests of, and on account of the bankrupt, and if we were to allow this transaction to go through and this adjudication to be annulled, the bankrupt would be really getting rid of his bankruptcy on the terms of paying a small composition to each of the creditors”. It is not necessary, to bring a case within this section, that the payment should have been made through the Official Assignee or Receiver; the payment may be made direct to the creditors.

339. Power to annul discretionary under the Presidency-towns Insolvency Act.—As under the English law (p), so under sec. 21 of the Presidency-towns Insolvency Act, the power to annul an adjudication is discretionary. *Even if all the debts are paid in full*, the Court may, in the interests of commercial and public morality, refuse to annul an adjudication (q).

(j) *Brijji Kessoor Laul v. Official Assignee, Madras* (1920) 43 Mad. 71, 52 I. C. 979. See also *Behary Lal Sikdar v. Harsukh Das Chakmal* (1920) 25 C.W.N. 137, 61 I. C. 904.

(k) *Re Flatas* (1893) 2 Q.B. 219; *Re Hester* (1889) 22 Q.B.D. 632; *Re Dixon* (1888) 5 Morr. 291; *Motilal v. Ganpatram* (1915) 21 C.W.N. 936, 34 I.C. 792; *Kottapali v. Official Receiver* (1929) 57 Mad.

L. J. 816.

(l) *Re Dixon and Cardus* (1888) 5 Morr. 291; *Re Shivlal Rathi* (1917) 19 Bom. L. R. 365, 40 I. C. 207.

(m) *Muhammad Ebrahim v. Ram Chandra* (1926) 48 All. 272, 92 I.C. 514, ('26) A.A. 289.

(n) *Re Keet* (1905) 2 K. B. 666.

(o) *Re Burnett* (1894) 1 Mans. 89.

(p) See B.A., 1914, s. 35.

(q) *Re Gyll* (1889) 59 L.T. 778, 779
Re Hester (1889) 22 Q.B.D. 632.

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In the absence of special circumstances, the Court ought not, in the exercise of its discretion, to make an order of annulment where, if the insolvent were applying for his order of discharge, an order of discharge would not be granted (r). Annulment may accordingly be refused where an insolvent does not disclose all his property in his schedule or where he has committed other grave offences against the bankruptcy laws (r1). An insolvent, however, whose application for annulment is refused on the ground of misconduct is not precluded from making a second application under this section to annul the insolvency after a reasonable time has elapsed from the date of the insolvency (s). Deliberate suppression of the fact that an insolvency proceeding is pending in another Court is not of itself a ground for annulling an adjudication (t).

340. No discretion under the Provincial Insolvency Act.—The word used in the Presidency-towns Insolvency Act is "may"; in the Provincial Insolvency Act, it is "shall." The Court therefore has no discretion under the Provincial Insolvency Act to refuse an annulment if the debts are paid in full. In a Bombay case under the Provincial Insolvency Act, 1907, Macleod, C.J., observed that the jurisdiction to annul an adjudication was discretionary, but the learned Judge seems to have overlooked the distinction between the two Acts (u). In a Calcutta case the question whether the Court had a discretion under the Provincial Insolvency Act to refuse an annulment was left open (v).

341. Inherent power to annul adjudication.—As stated in para. 333 there are only five cases in which an adjudication may be annulled. The question for consideration is whether there is any power to annul an adjudication outside the provisions of the Acts.

In England it has been held in some cases that there is no power to annul a bankruptcy outside the provisions of the Bankruptcy Act (w). At the same time there have been cases in which it was assumed that the Court had an inherent power to prevent abuse of its own process (x), and receiving orders have been refused on that ground (y), and have also been rescinded on that ground (z).

(r) *Re Keet* [1905] 2 K.B. 666, at p. 677, per Stirling, L.J. See also *Re Subrati Jan Mahomed* (1914) 38 Bom. 200, at p. 203, 20 I.C. 859, per Macleod, C.J. The case was one under the Prov. I. A., and the observations, if intended to apply to that Act, would not be correct.

(r1) *Re Taylor* [1901] 1 K.B. 744; *Re Beer* [1903] 1 K.B. 628.

(s) *Re Taylor* [1901] 1 K.B. 744, at p. 746.

(t) *Re Arannayal Sabhapathy* (1897) 21 Bom. 297, 309-310.

(u) *Re Subrati Jan Mahomed* (1914) 38 Bom. 200, 203, 20 I. C. 859.

(v) *Motilal v. Ganapatram* (1915) 21 C.W.N. 936, 34 I.C. 792.

(w) *Re Gyll* (1888) 5 Morr. 272; *Re Hester* (1889) 22 Q.B.D. 632, 633.

(x) *Ex parte Painter* (1895) 1 Q. B. 85, 88-89; *Re Hancock* (1904) 1 K. B. 585.

(y) *Re Bond* (1898) 21 Q. B. D. 17.

(z) *Re Betts* (1901) 2 K. B. 39.

In India there were cases under the Provincial Insolvency Act, 1907, **Para. 341** in which it was held that the Court had inherent power to refuse adjudication if the presentation of the debtor's petition was an abuse of the process of the Court, as where the debtor was guilty of such misconduct as would not entitle him to a discharge. These decisions were overruled by the Privy Council in *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram (a)*, where it was held that once the conditions laid down in the Act were complied with the debtor was entitled as of right to an order of adjudication, and any misconduct on his part was a matter to be dealt with in the course of his application for discharge. Dealing with the question of inherent power their Lordships said: "In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied (b). This does not depend on the Court's discretion, but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not deprived of that right on so treacherous a ground of decision as an 'abuse of the process of the Court'." This decision settles the matter so far as the Courts exercising jurisdiction under the Provincial Insolvency Act, 1920, are concerned. It is no longer competent to them to refuse adjudication or to annul an adjudication on the ground that the presentation of the petition is an abuse of the process of the Court.

Different considerations arise in cases governed by the Presidency-towns Insolvency Act. Under that Act, even if the conditions laid down in the section are complied with, the Court "may"—not "shall"—as in the Provincial Insolvency Act—make an order of adjudication (c). It would seem, therefore, that the Court has discretion to make, or not to make, an order of adjudication, and it may refuse adjudication if the presentation of the petition is an abuse of the process of the Court, and, also, it may annul an adjudication where the adjudication was made upon such a petition. This is precisely what the High Court of Calcutta did in *Re Ballan Chand Serowgee (d)*. In that case the debtor was adjudged insolvent on his own petition, but he failed to apply for his discharge and his adjudication was thereupon annulled. Afterwards he presented another petition for his adjudication upon the same facts and an order of adjudication was made upon it. One of the creditors applied for annulment of the adjudication on the ground that the presentation of the second petition was in the circumstances of the case an abuse of the process of the Court. This contention was upheld and the adjudication was annulled. The learned judge followed an earlier ruling of the same High Court (e) which was based on English cases on

(a) (1916) 44 I. A. 11, 44 Cal. 535, 39 I. C. 788.

(b) Note the words "the Court shall make an order of adjudication" in Prov. I. A., 1907, s. 16 (1), now Prov. I. A., 1920, s. 27 (1).

(c) See P.-t. I. A., s. 15 (1).

(d) (1922) 27 C.W.N. 739, 80 I. C. 651, ('23) A.C. 703.

(e) *Malchand v. Gopal Chandra Ghosal* (1917) 44 Cal. 899, 39 I. C. 199.

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the subject (*f*). The Privy Council case referred to above was distinguished on the ground that the facts of that case were quite different. If a case like *Re Ballan Chand Serougee* arose again, whether under the Presidency-towns Insolvency Act or under the Provincial Insolvency Act, the adjudication would be annulled, no longer on the ground of any abuse of the process of the Court, but under the express provisions of sec. 21 of the Presidency-towns Insolvency Act and sec. 35 of the Provincial Insolvency Act, as amended by Act XI of 1927, for the second petition could not be presented without the leave of the Court which annulled the adjudication on the first petition.

The position then is this. Misconduct on the part of the debtor such as would disentitle him to a discharge is no longer a ground for refusing adjudication. It is a matter to be dealt with upon his application for discharge. This gets rid of one form of abuse of the process of the Court. Further, the presentation of a second petition by a debtor whose first adjudication was annulled owing to his failure to apply for his discharge is now a matter to be dealt with under sec. 14 (2) and the amended sec. 21 of the Presidency-towns Insolvency Act, and sec. 10 (2) and the amended sec. 35. [see paras. 181 and 223 above.] This gets rid of another form of abuse of the process of Court. There is yet another form of such abuse, namely, the presentation of a second or third petition by an undischarged insolvent. This has been dealt with in paras. 181A and 213A above.

342. Annulment refused.—The mere fact that all the creditors consent will not entitle the debtor to have an adjudication annulled (*g*). It is no ground for annulling an adjudication that though a long time has elapsed since the date of adjudication, the Receiver has not been able owing to want of assets to pay the debts in full or that the opposing creditor was at one time willing to accept a composition and to have the matter settled out of Court (*h*), or that the debtor falsely alleged when he was adjudged insolvent that he had not kept any books of account (*i*), or that the insolvent had given undue preference to some of the creditors (*j*), or that he had failed to

- (*f*) *Re Painter* (1895) 1 Q. B. 85; *Re Betts* (1901) 2 K. B. 39; *Re Hancock* (1904) 1 K.B. 585.
 (*g*) *Re Flatau* [1893] 2 Q.B. 219; *Re Hester* (1889) 22 Q.B.D. 632; *Re Dixon and Cardus* (1888) 5 Morr. 291; *Motilal v. Ganapatram* (1915) 21 C.W.N. 936, 34 I. C. 792.
 (*h*) *Motilal v. Ganapatram* (1915) 21

- C.W.N. 936, 34 I.C. 792. See also *Jam Khan v. Debi Dutt* (1915) 29 I. C. 888.
 (*i*) *Karulhan Chettiar v. Raman Chetti* (1926) 51 Mad. L. J. 474, 98 I. C. 21, ('26) A.M. 1159.
 (*j*) *Malchand v. Gopal Chandra Ghosal* (1917) 44 Cal. 899, 39 I.C. 199.

pay a portion of his salary as directed by the Court when the order of adjudication was made (k).

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343. (3) Where debtor's petition presented without leave of Court.—It is provided by sec. 14 (2) of the Presidency-towns Insolvency Act, and sec. 10 (2) of the Provincial Insolvency Act, that a debtor in respect of whom an order of adjudication has been annulled owing to his failure to apply or to prosecute an application for his discharge under sec. 41 of the Presidency-towns Insolvency Act or sec. 43 (1) of the Provincial Insolvency Act is not entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. The present section provides that if an order of adjudication is made on a petition presented without the leave of the Court, the Court may annul the adjudication. This provision was introduced both in sec. 21 of the Presidency-towns Insolvency Act and in sec. 35 of the Provincial Insolvency Act by Act XI of 1927. It is to be observed that the word used in the newly added portion of both the sections is “may.” The annulment in such a case would therefore seem to be discretionary with the Court.

344. Limitation.—There is no bar of limitation with regard to an application for annulment of adjudication (l).

(k) *Ram Chandra Neogi v. Shyama Charan Bose* (1913) 18 C.W.N. 1052, 21 I.C. 952.

(l) *Harish Chandra Mukherjee v. The East India Coal Co., Ltd.* (1912) 16 C.W.N. 733, 736, 14 I.C. 576.

*B.—Concurrent proceedings in another Court.***Paras.
345-347**

345. Power to annul: case B.—The sections of the two Acts relating to annulment under this head are as follows:—

*P.-t. I. A., s. 22.**Prov. I. A., s. 36.*

Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court whether within or without British India against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon.

If, in any case in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or stay all proceedings thereon.

Points of difference between the Presidency-towns Insolvency Act and Provincial Insolvency Act.—Under the Provincial Insolvency Act, the Court can annul an adjudication if insolvency proceedings are pending in another Court in British India. Under the Presidency-towns Insolvency Act, the Court can annul an adjudication not only if insolvency proceedings are pending in another Court in British India, but also if they are pending in any Court without British India.

346. Concurrent orders of adjudication.—A debtor may be adjudged insolvent by two or more Courts. He may be so adjudged by the Court of the place where he resides and also by the Court of the place in which he carries on business (m). Again if he carries on business in two or more places, he may be adjudged insolvent by each of the Courts within whose local limits he carries on business. If he is adjudged insolvent by one Court, and afterwards by another Court, either Court may annul its own order of adjudication or stay its own proceedings, if the assets can be more conveniently administered by the other Court. No Court has power to annul an order of adjudication made by another Court or to stay proceedings in that Court (n).

347. Power to annul or stay proceedings discretionary.—The power to annul an adjudication or to stay proceedings under this section is discretionary (o). The question to be considered in each case will be, by which Court the assets could be most conveniently administered. Thus if proceedings

(m) See P.-t. I. A., s. 11; Prov. I. A., s. 11.

(n) *Re Naginal Maganlal* (1925) 49 Bom. 788, 794, 91 I.C. 160, ('25) A.B. 543; *Re Manekchand* (1923) 47 Bom. 275, 281, 75 I.C. 61,

('22) A.B. 390.

(o) See *Sastikinkar Banerjee v. Hursookdas Chogemull* (1927) 31 C. W. N. 1002, 104 I. C. 1, ('27) A. P.C. 162.

are pending simultaneously in Court *A* and Court *B*, and the property can be more conveniently distributed by Court *B*, Court *A* should yield to Court *B*. The fact that the first insolvency was in Court *A* is no ground for refusing to stay proceedings in that Court. In a Bombay case the Court in the exercise of its discretion stayed all proceedings before it, leaving the Bombay creditors to take such steps as they might think proper in Madras, where the debtor had been previously adjudged insolvent. As to the Bombay creditors the Court said: "This may appear hard upon them, but it would be equally hard on the Madras creditors to be compelled to take steps in Bombay" (*p*). In a Madras case, the first insolvency was in the Madras High Court and the second insolvency was in the Rangoon High Court. The Official Assignee of Madras was unable to recover the assets of the insolvent, but a good part of the assets was realised by the Official Assignee of Rangoon. Upon these and other facts the High Court of Madras annulled the adjudication before it, leaving it to the Madras creditors to prove against the estate of the insolvent in the Rangoon High Court (*q*).

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A prior bankruptcy in England by an English Bankruptcy Court is not of itself a ground for annulling a subsequent adjudication in India, but the Indian Court may in the exercise of its discretion, annul its own adjudication or stay the proceedings before it (*r*).

C.—Annulment on approval of composition or scheme.

348. Annulment on approval of composition or scheme ; case C [P.-t. I. A., s. 30 ; Prov. I. A., s. 39].—Where a proposal submitted by an insolvent for a composition or for a scheme is approved by the Court, the terms thereof are embodied in an order of the Court, and the adjudication is annulled. This subject is considered in paras. 376-377 below.

- (*p*) *Re Aranvayal Sabapathy* (1897) 21 Bom. 297, 311 ; *In the matter of William Watson* (1904) 31 Cal. 761.
(*q*) *Official Assignee of Madras v.*

- Official Assignee of Rangoon* (1919) 42 Mad. 121, 49 I. C. 210.
(*r*) *In the matter of William Watson* (1904) 31 Cal. 761.

D.—Annulment on failure to apply for discharge.

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349. Annulment on failure to apply or to prosecute application for discharge: case D [P.-t. I. A., s. 41; Prov. I. A., s. 43].—The fourth case in which an adjudication may be annulled is where the insolvent does not appear at the hearing of his application for discharge or fails to apply for his discharge. The provisions of the two Acts on this subject are as follows. The italics indicate the main points of difference between the two sections.

P.-t. I. A., s. 41.

If any insolvent does not appear on the day so appointed for hearing his application for discharge or if an insolvent shall not apply to the Court for an order of discharge within such time as may be prescribed, the Court, on the application of the official assignee or of a creditor or of its own motion, *may annul the adjudication or make such other order as it may think fit*, and the provisions of sec. 23 shall apply on such annulment.

Power to annul adjudication on failure to apply for discharge.

Prov. I. A., s. 43.

If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court *the order of adjudication shall be annulled*, and the provisions of sec. 37 shall apply accordingly.

350. Power to annul discretionary under Presidency-towns Insolvency Act.—If the insolvent does not appear at the hearing of the application for his discharge or does not apply to the Court for an order of discharge within such time as may be prescribed by the Rules (s), the Court *may* in its discretion annul the adjudication *or make such other order as it may think fit*. The Rules also provide for notice of the intended application to be given to the insolvent and for its publication in the Local Official Gazette (t). If the adjudication is annulled, the Court has the power under sec. 23 (1) of the Presidency-towns Insolvency Act to make an order vesting the insolvent's property in a person appointed by the Court for the protection of the creditors. If under a protection order the debtor was released from custody, the Court may also recommit him under sec. 23 (2) to his former custody.

(s) The period prescribed by Calcutta Rule 142A and Bombay Rule 136 is eighteen months from the date of the order of adjudication. The period prescribed by Rangoon Rule 177 is three months from the date of the order of adjudication or two months after the

conclusion of the public examination (if any) of the insolvent whichever is the later period.

(t) See Calcutta Rules 142B, 142C, Bombay Rules 137, 138 and Rangoon Rule 177. There is no provision for publication of notice in the Rangoon Rule.

351. Whether power to annul discretionary under Provincial Insolvency Act.—Under sec. 27 of the Provincial Insolvency Act the Court must specify in the order of adjudication the period within which the insolvent shall apply for his discharge. Under the same section the Court has power to extend the period for applying for discharge. Sec. 43 (1) of the Provincial Insolvency Act provides that if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication *shall* be annulled. If no period is specified in the order of adjudication for applying for discharge, the adjudication, of course, cannot be annulled (u). Where the period is specified, and the insolvent applies for extension before the expiry of the period originally fixed, the Court has the power to extend the time, and if the time is extended the adjudication cannot be annulled. The case where the insolvent does not apply for extension before the expiry of the original period may next be considered.

There is a conflict of opinion whether, if the insolvent does not apply for extension of time within the period originally fixed for applying for discharge, the Court has power, after the expiry of that period, to extend the time for applying for discharge under sec. 27 (2), or whether, the Court should refuse to extend the time and annul the adjudication. The conflict turns upon the words "*shall* be annulled" in sec. 43 (1). It has been held in Calcutta, Lahore, Patna, Nagpore and Sind, and recently in Madras, that sec. 43 is directory, and that the Court has power even after expiry of the period originally fixed to extend the time for applying for discharge. On the other hand it has been held by the Chief Court of Oudh that sec. 43 is mandatory and that after the expiry of the original period the Court has no power under sec. 27 (2) to extend the time for applying for discharge and that the adjudication must be annulled. See para. 225 where the cases are cited.

There is a good deal to be said in favour of either view. The former view, namely, that the Court has power to extend the time even after the expiry of the period originally fixed, is not negated by the language of sec. 27. That section does not in terms limit the power to extend the time to cases where the application for extension is made before the expiry of the period originally fixed, and this seems to be the only ground on which that view can be supported. Analogies founded on this or that ruling of the Privy Council are misleading. In some of the cases in which this view was taken the Courts relied upon the decision of the Privy Council in *Badri Narain v. Sheo Koer* (v), a case under sec. 549 of the Code of Civil Procedure, 1882, now O. 41, r. 10, of the Code of 1908. As against that may be cited

(u) *Gopal Ram v. Magni Ram* (1928) 7 Pat. 375, 107 I.C. 830, ('28) A.P. 338.
(v) (1890) 17 Cal. 512, 17 I. A. 1.

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a later judgment of the same tribunal in *Sabitri Thakurin v. Savi (w)*, a case also under O. 41, r. 10. Still nearer home is *Chhatrapat Singh Dugar's* case (*x*), where the Privy Council held that the word "shall" in sec. 16 (1) of the Provincial Insolvency Act, 1907, now sec. 27 (1) of the Act of 1920, means "shall" and not "may." Sec. 148 of the Code of 1908 has also been invoked in support of the same view, but to do so, it is respectfully submitted, is begging the question. If sec. 43 controls sec. 27 so as to take away the power of the Court to extend the time after the expiry of the period originally specified, in other words, if under the Act itself the Court has no such power, sec. 148 of the Code cannot come in, for the powers of the Court in the exercise of its original civil jurisdiction are expressly made "subject to the provisions of this Act" by sec. 5 of the Act.

As to the latter view, namely, that sec. 43 is mandatory, it is to be observed that there was no such section in the Provincial Insolvency Act, 1907. Sec. 43 was introduced for the first time in the Act of 1920. It was taken from sec. 41 of the Presidency-towns Insolvency Act. The difference in the language of the two sections is striking. Under sec. 41, "the Court *may* annul the adjudication or *make such other order* as it may think fit." Under sec. 43, "the order of adjudication *shall be annulled*." This shows what the intention of the legislature was. The legislature intended that a Court exercising jurisdiction under the Provincial Insolvency Act "shall" annul the adjudication and that it should have no power to "make such other order as it may think fit." Whichever view be correct, it is high time that the legislature should intervene. It is suggested that sec. 43 should be left as it stands, and that sec. 27 should be amended so as to limit the power of the Court to extend the time to cases where the application for extension is made before the expiry of the period originally fixed for applying for discharge. This course, if adopted, will compel the insolvent to be prompt. Moreover, it will not entail any hardship either on the debtor or on the creditors. The debtor cannot complain, for he can always, if he so chooses, apply for extension before the expiry of the original period. The creditors cannot complain for the Court has power while annulling the adjudication to make an order vesting the debtor's property in some person named for that purpose. If any proceedings have been instituted by the Receiver to set aside a transfer under sec. 53 or sec. 54 of the Act, they can continue notwithstanding the annulment (*y*), provided the debtor's property vests in the Receiver or some other person appointed by the Court.

352. Application for annulment and notice under Provincial Insolvency Act.—As under sec. 41 of the Presidency-towns Insolvency

(w) (1921) 48 Cal. 481, 48 I. A. 76, 60

I.C. 274, (21) A.P.C. 80.

(x) (1916) 44 Cal. 535, 44 I.A. 11, 39

I. C. 788.

(y) *Jethaji Peraji Firm v. Krishnayya*
(1929) 52 Mad. 648.

Act, so under sec. 43 of the Provincial Insolvency Act, an application for annulment may be made either by the Receiver or by a creditor (z). The Court also may of its own motion annul an adjudication. Notice of the intended application should be given to the creditors (a). Notice, it is submitted, should also be given to the insolvent, in any event in cases arising in those provinces where the view prevails that the Court is not bound on the insolvent's failure to apply for his discharge within the specified time to annul the adjudication, so that if the failure is satisfactorily explained, adjudication may not be annulled. Such notice is usual under the Presidency-towns Insolvency Act (b). In a Patna case, Adami, J., said that the insolvent was not entitled to any notice in any case (c).

353. No automatic annulment of adjudication.—No adjudication can be annulled except by an order of the Court. Failure on the part of the insolvent to apply for his discharge within the specified time does not *ipso facto* annul the adjudication (d). Dealing with this question the High Court of Calcutta said : " It is urged that on the expiry of the period specified, adjudication becomes automatically annulled if no application is made prior to the expiry of the period. We have not been shown any authority in support of that contention. It is true that sec. 43 provides that the order of adjudication shall be annulled ; but that seems to indicate that it is to be annulled at the instance of the opposite party or by the Court itself and does not stand cancelled automatically on the expiry of the period " (e).

In an Allahabad case an application was made for the arrest of an insolvent in execution of a decree against him. The insolvent had not obtained any protection order nor had he applied for his discharge within the time specified by the Court. It was contended for the insolvent that as he had not applied for his discharge within the specified time, the adjudication stood annulled automatically and that he was automatically discharged. This contention did not prevail and it was held that the insolvent was liable to arrest (f).

(z) *Arunagiri v. Kandaswami* ('24) A. M. 655, 83 I. C. 955.

(a) *Jethaji Peraji Firm v. Krishnayya* (1929) 52 Mad. 648, 652; *K. K. S. A. R. A. Chettiar v. Maung Myat Tha* (1927) 100 I. C. 921, ('27) A. R. 136.

(b) See para. 350 above.

(c) *Gopal Ram v. Magni Ram* (1928) 7 Pat. 375, 386, 107 I. C. 830, ('28) A. P. 338.

(d) *Abraham v. Sookias* (1924) 51 Cal.

337, 81 I. C. 584, ('24) A. C. 777; *Gopal Ram v. Magni Ram* (1928) 7 Pat. 375, 107 I. C. 830, ('28) A. P. 338; *Jethaji Peraji Firm v. Krishnayya* (1929) 52 Mad. 648, 655.

(e) *Abraham v. Sookias* (1924) 51 Cal. 337, 341, 81 I. C. 384, ('24) A. C. 777.

(f) *Maharaj Hari Ram v. Sri Krishan Ram* (1927) 49 All. 201, 100 I. C. 320, ('27) A. A. 418.

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354. Insolvency proceedings do not terminate ipso facto on annulment.—It is provided by both the Acts (*g*) that where an adjudication is annulled, all sales and disposition of property and payments duly made, and all acts theretofore done, by the Court or Receiver, shall be valid ; but subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint. The insolvency proceedings do not necessarily come to an end on an annulment of adjudication owing to the insolvent's failure to apply or to prosecute an application for his discharge. The consequences of the annulment are that the insolvent does not get back any property which has already been distributed amongst his creditors, and as to such property as still remains, the Court will, to protect the creditors, make an order vesting it in such person as the Court may appoint (*h*). Where such an order is made, the person in whom the property is vested has full power to deal with the property. He may sell it and distribute the sale proceeds amongst the creditors (*i*). If before the annulment the Official Assignee or Receiver has applied to set aside a transfer under sec. 53 or sec. 54, the application may be prosecuted after the annulment, the application being an "act" within the meaning of sec. 23 (1) of the Presidency-towns Insolvency Act and the corresponding sec. 37 (1) of the Provincial Insolvency Act (*j*), but this cannot be done unless the debtor's property has vested in some person appointed by the Court. The Court may also recommit the insolvent to his former custody and he will be subject to all the processes that had previously been in force against him. Further, any creditor may after annulment sue him for a debt due to him and any judgment-creditor may apply for his arrest in execution of a decree against him.

355. Remedy of debtor.—A debtor whose adjudication is annulled under the section now under consideration cannot apply to have the order set aside under the provisions of the Code of Civil Procedure, 1908. The reason is that the provisions of the Code apply subject to the provisions of the Insolvency Acts (*k*), and the Acts provide a specific remedy for such cases, namely, that the debtor may present a fresh petition for adjudication with the leave of the Court by which the adjudication was annulled (*l*). It was accordingly held by the High Court of Madras in a case under the Provincial Insolvency Act that a debtor whose adjudication is annulled owing to his failure to appear on the day fixed for the hearing of the application for his discharge, is not entitled to have the order set aside

(*g*) P.-t. I. A., s. 23 (1); Prov. I. A., s. 37 (1).

(*h*) *Jethaji Peraji Firm v. Krishnayya* (1929) 52 Mad. 648, 653; *Roop Narain v. King King & Co.* (1921) 94 I.C. 234, ('26) A. L. 370.

(*i*) *Bagi Ram v. Chanan Mal* (1928) 10

Lah. L.J. 180, 108 I.C. 603, ('28) A. L. 453.

(*j*) *Jethaji Peraji Firm v. Krishnayya* (1929) 52 Mad. 648, 47 Mad. L.J. 116.

(*k*) P.-t. I. A., s. 90; Prov. I. A., s. 5.

(*l*) P.-t. I. A., s. 14 (2); Prov. I. A., s. 10 (2).

under O. 9, r. 9, of the Code of Civil Procedure, 1908 (*m*). In another **Paras.**
 Madras case, also under the Provincial Insolvency Act, it was held that the **355, 355A**
 Insolvency Court has power to review its own orders including an order
 annulling an adjudication on the application either of the debtor or of a
 creditor who has tendered his proof, and that that power was conferred by
 sec. 5 of the Provincial Insolvency Act read with O. 47 of the Code (*n*).
 It is difficult to reconcile these two decisions.

*E.—Annulment of insolvency proceeding pending in a
 subordinate Court.*

355A. Annulment of insolvency proceeding pending in a sub-
 ordinate Court: case **E.** [P.-t. I. A., s. 18A].—By sec. 18A of the Presidency-
 towns Insolvency Act, inserted in the Act by the Insolvency Law (Amend-
 ment) Act, 1930, the Insolvency Court has the power, at any time after the
 presentation of the insolvency petition, to stay any insolvency proceedings
 pending against the debtor in any Court subject to the superintendence
 of the Court, and, at any time after the making of an order of adjudication,
 to annul an adjudication against the debtor made by any such Court. Where
 an adjudication is so annulled, all sales and dispositions of property and pay-
 ments duly made and all acts done by the Court whose order is annulled, or
 by the Receiver appointed by it or other person acting under his authority,
 shall be valid, but the property vested in such Court or Receiver shall vest
 in the Official Assignee, and the Court may make such direction in regard to
 the custody of such property as it thinks fit.

<p>(<i>m</i>) <i>Venugopalachariar v. Chunnimal</i> (1926) 49 Mad. 935, 97 I. C. 706, ('26) A.M. 912.</p>	<p>(<i>n</i>) <i>Abbireddi v. Venkatareddi</i> (1926) 51 Mad. L. J. 60, 94 I.C. 351, ('27 A.M. 175.</p>
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F.—Effect of Annulment.

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356. Sections relating to effect of annulment [**P.-t. I. A., s. 23**; **Prov. I. A., ss. 37, 43 (2)**].—The following are the sections of the two Acts dealing with the effect of annulment :—

P.-t. I. A., s. 23.

23. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official assignee or other person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such terms and subject to such conditions (if any) as the Court may declare by order.

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled as aforesaid, the Court may, if it thinks fit, recommit the debtor to his former custody, and the jailor or keeper of the prison to whose custody such debtor is so recommitted shall receive such debtor into his custody according to such a recommitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if such order had not been made.

Prov. I. A., s. 37 (1), s. 43 (2).

37 (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

43 (2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sec. 43 (1), the Court may, if it thinks fit, recommit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is so recommitted shall receive such debtor into his custody according to such recommitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made.

357. Effect of annulment.—The effect of this section, subject to any *bona fide* dispositions lawfully made prior to the annulling of the insolvency, and subject to any condition which the Court annulling the insolvency may by its order impose, is to remit the party whose insolvency is set aside to his original position, unless an order is made vesting the property of the insolvent in some other person. If no such order is made and no condition is imposed, the general provision of the section has its full effect, and that effect is to remit the insolvent, at the moment the order annulling the adjudication is made, to his original powers and rights in respect of his property (o). The effect of an annulment depends on the terms of the order

(o) *Bailey v. Johnson* (1872) L. R. 7 Ex. 263, 265; *Maung Hme v.*

U Po Seik (1925) 3 Rang. 201, 86 I. C. 324, ('25) A. R. 301.

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made by the Court while annulling the adjudication. The order varies according to the nature of the case. As to vesting the property of the insolvent after annulment in another person, there is this distinction between an annulment after the Court has approved a composition (*p*) and an annulment where the debtor ought not to have been adjudged insolvent or has paid his debts in full (*q*), that while in the former case there is a continuance of the insolvency in another form and the Court will as a rule make an order vesting the insolvent's property in another person for the benefit of the creditors, there is no such continuance in the latter case and the Court will not as a general rule make any such order. If no such order is made, the property will revert to the debtor and he will, subject as aforesaid, be remitted to his original rights. Nothing, however, vests in the insolvent which was not in the Official Assignee or Receiver at the date of annulment. As a necessary consequence of this, if during the continuance of the insolvency, the Official Assignee or Receiver does not take steps to recover a debt due to the insolvent and the debt becomes time-barred, the debt will continue to be time-barred notwithstanding the annulment, and the debtor cannot recover it after annulment (*r*). At the same time if a proof was rejected by the Official Assignee or Official Receiver, the creditor cannot, after annulment, enforce the claim, the rejection of the proof being an "act" done by the Official Assignee which is not nullified by the annulment (*s*).

As to the effect of annulment on approval of a composition or scheme, see para. 377 below.

As to the effect of annulment owing to the insolvent's failure to apply, or to prosecute the application for his discharge, see para. 354 above.

358. Effect of Annulment on suits and other Proceedings.—

The effect of an annulment on a suit or other proceeding commenced by the Official Assignee or Receiver depends on whether the property has reverted to the debtor unconditionally or whether it has vested in some other person by an order of the Court.

If the property has reverted to the debtor, he is entitled to continue a suit instituted by the Official Assignee or Receiver to recover a debt due to him or to recover property belonging to him. The suit does not abate on annulment of adjudication (*t*). If after the institution of a suit the plaintiff is adjudged insolvent, and the suit is dismissed owing to failure on the part of the Official Assignee to proceed with it, and the adjudication is subsequently annulled and the property reverts to the plaintiff, the Court may on the plaintiff's application restore the suit (*tl*). In an Allahabad case a suit was filed by the Receiver to recover a debt due to the insolvent. The adjudication was subsequently annulled, but the Receiver continued the

(*p*) See P.-t. I. A., s. 30; Prov. I. A., s. 39.

(*q*) P.-t. I. A., s. 21; Prov. I. A., s. 35.

(*r*) *Markwick v. Hardingham* (1880) 15 Ch. D. 339.

(*s*) *Brandon v. McHenry* (1891) 1

Q. B. 538.

(*t*) *Haji Sajan v. N. C. Macleod* (1908) 32 Bom. 321, 334. See C. P. C., 1908, O. 22, r. 10.

(*tl*) *Kisan Gopal v. Suklal* (1926) 53, Cal. 844, 98 I.C. 781, ('27) A.C. 76.

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suit and a decree was passed in his favour. It was contended for the defendant that the Receiver had no *locus standi* to continue the suit after annulment. But this contention was not accepted and it was held that no objection having been made by the insolvent to the suit being continued by the Receiver, the Court had power to pass the decree and that the decree was not a nullity. The Court said: "There can be no doubt that the suit was properly instituted originally. There can be no doubt that the suit could have been continued after the annulment in the name of the insolvent if not by the receiver" (u). It is true that in the ordinary case of an assignment or devolution of interest, the original plaintiff may continue the suit (u1), but it is highly desirable in the case of the Official Assignee or Receiver that he should have nothing to do after annulment with a suit instituted by him and he should take immediate steps, after giving notice to the insolvent, to have his own name struck out as plaintiff.

An application by the Official Assignee or Receiver to recover property by virtue of his superior title stands on a different footing from a suit filed by him to recover property belonging to the insolvent from a stranger to the insolvency. Thus if an application is made by the Official Assignee or Receiver to set aside a transfer under sec. 55 or sec. 56 of the Presidency-towns Insolvency Act [Provincial Insolvency Act, sec. 53 or 54], the application lapses on annulment, and the debtor cannot prosecute it. The reason is that the estate reverts to him "to the extent [only] of his right or interest therein." The right to have the transfer set aside was not the debtor's right at all. It was the right of the Official Assignee or Receiver *qua* Official Assignee or Receiver on behalf of the general body of creditors (v).

359. Vesting of property in person appointed by the Court.—A person in whom property is vested by an order of the Court has full power to deal with the property vested in him (w).

360. Effect of annulment on forfeiture clauses.—This subject is discussed in Lecture VIII under the headings "Forfeiture clauses in wills and settlements," and "Forfeiture of lease on insolvency."

G.—Insolvency Rules as to annulment.

360A. Insolvency rules as to annulment.—As to Rules under the Presidency-towns Insolvency Act see Calcutta Rules 100-102; Bombay Rules 89-89A; Rangoon Rules 129-132. As to Rules under the Provincial Insolvency Act see Calcutta Rule 6 and Allahabad Rule 6.

(u) *Mannu Lal v. Nalin Kumar Mukerji* (1919) 41 All. 200, 48 I. C. 443.

(u1) See *Rai Charan v. Biswa Nath* (1914) 20 Cal. L.J. 107, 26 I.C. 410, and C.P.C. O. 22, r. 10.

(v) *Henley's Bankrupt Law*, 3rd ed., p. 445; *Crew v. Terry* (1877) 2 C.

P. D. 403, 409; *Maung Hme v. U Po Seik* (1925) 3 Rang. 201, 86 I. C. 324, ('25) A. R. 301. See P.-t. I. A., s. 55; Prov. I. A., s. 53.

(v) *Bagi Ram v. Chanan Mal* (1928) 10 L. L. J. 180, 108 I.C. 603, ('28) A. L. 453.

LECTURE VII.

PART I.

COMPOSITION AND SCHEMES OF ARRANGEMENT.

P.-t. I. A., ss. 28-32 ; Prov. I. A., ss. 38-40.

361. Composition apart from Insolvency Acts.—A debtor who is unable to pay his debts in full may arrange his affairs with his creditors without having recourse to a petition for his own adjudication. Arrangements between debtors and creditors are known as composition agreements. A composition agreement may take the form of an agreement by which the creditors agree to abandon their claims in consideration of receiving a composition on their debts, that is, a smaller sum bearing an agreed proportion to the amount of their respective claims. It may also take the form of an assignment by which the debtor assigns the whole of his property to a trustee for realisation and rateable distribution of the proceeds amongst all his creditors or amongst those who assent to and take the benefit of the assignment, and the creditors in consideration of such assignment release their original claims and accept the dividend payable under the agreement in discharge of their debts (a). The difference between these two methods is that while a simple composition agreement does not of itself operate as an act of insolvency, an assignment amounts to an act of insolvency as coming within the provisions of sec. 9 (a) of the Presidency-towns Insolvency Act and the corresponding sec. 6 (a) of the Provincial Insolvency Act. Although such an assignment is an act of insolvency, it is not open to every creditor to found an insolvency petition upon it. Thus a creditor who has been a party or privy to the assignment is estopped from setting it up as an act of insolvency [see para. 148 (16) above]. Further, it can be availed of as an act of insolvency only if an insolvency petition is presented against the debtor within three months from the date thereof. If a petition is presented within three months, the assignment is liable to be set aside at the instance of the Official Assignee or Receiver as being in itself an act of insolvency. If no petition is presented within three months, the assignment becomes indefeasible unless it comes within the provisions of sec. 53 of the Transfer of Property Act, 1882 [see para. 138 (8) above].

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The trustee under an assignment which is in itself an act of insolvency incurs great personal responsibility if he takes any steps for the realisation of the property until after the expiration of three months from the execution of the deed ; for if the deed is set aside as an act of insolvency, he may be obliged to transfer the whole of the property assigned to him without any credit being given to him for expenses incurred or for payments made by him

(a) See *Malackchand v. Manilal* (1904) 28 Bom. 364, 367-368 ; *Re Hatton*

(1872) L. R. 7 Ch. App. 723, 726. Indian Contract Act, 1872, s. 63, ill. (e).

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under the deed (b). The Official Assignee or Receiver, however, must elect whether he will treat the trustee under the deed as a trespasser or accept his acts and treat him as his agent. If the trustee is treated as a trespasser, he must hand over to the Official Assignee or Receiver all the property of the debtor which remains in his possession unconverted, and must pay the value of any property which he has converted. If he is treated as an agent, he must hand over to the Official Assignee or Receiver all the property of the insolvent which is in his possession and account for the profits which he has made or ought to have made (c). In England private deeds of arrangement are governed in certain cases by the Deeds of Arrangement Act, 1914, as amended by the Administration of Justice Act, 1925.

362. Composition after presentation of petition.—If a debtor enters into a composition agreement with his creditors after the presentation of an insolvency petition by or against him and *before* adjudication, the Insolvency Court may dismiss the petition by consent or may allow it to be withdrawn.

363. Composition after adjudication.—A debtor cannot *after* adjudication settle with his creditors out of Court. That can only be done by a composition or scheme under the Acts (d). The provisions of the Insolvency Acts as to composition and schemes of arrangement apply to composition or schemes *after* adjudication. Under the Provincial Insolvency Act, 1907, sec. 27 (1), a proposal for a composition or scheme could be submitted by the debtor either before or after an order of adjudication. Under the Act of 1920 as well as under the Presidency-towns Insolvency Act a proposal can only be submitted after an order of adjudication has been made. In England a proposal for a composition or scheme can be submitted both after a receiving order and after adjudication. If the proposal is submitted after a receiving order, and it is accepted by the creditors and approved by the Court, the receiving order will be rescinded (e); if it is not approved, the debtor will be adjudged insolvent. If the proposal is submitted after adjudication, and it is accepted by the creditors and approved by the Court, the adjudication may be annulled (f).

There are two points of difference between the provisions of the two Acts relating to composition and schemes of arrangement. The one is as to the binding effect of a composition or scheme; the other is as to the remedy of creditors to enforce payment under a composition or scheme in default of payment. In other respects, the provisions of the two Acts are almost the same, and they may be considered together.

364. Proposal of composition or scheme [P.-t. I. A., s. 28 (1); Prov. I. A., s. 38 (1)].—An insolvent may at any time after the making

- (b) *Re Richards* (1884) 1 Morr. 242; *Re Forster* (1887) 4 Morr. 292.
(c) *Ex parte Vaughan* (1884) 14 Q. B. D. 25.

- (d) *Re Shivalal Rathi* (1917) 19 Bom. L. R. 365, 369, 40 I. C. 207.
(e) Bankruptcy Rule 212.
(f) B.A., 1914, s. 21 (2).

of an order of adjudication submit a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs. A proposal by an insolvent who has succeeded to his father's estate to pay to his creditors the actual amount which may be found due after inquiry by the Court with such rate of interest as the Court may think reasonable is a proposal for a scheme of arrangement (g).

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365. Notice of meeting to creditors.—A day must be fixed for a meeting of creditors to consider the proposal, and notice of the meeting should be given to every creditor who has proved his debt. Under the Presidency-towns Insolvency Act the notice is to be given by the Official Assignee (h). Under the Provincial Insolvency Act the notice may be given by the Court or by the Receiver, as the case may be (i). Under the Presidency-towns Insolvency Act the Official Assignee is required to send to each creditor who is mentioned in the schedule, or who has tendered a proof at the meeting, a copy of the insolvent's proposals with a report thereon. Under the Provincial Insolvency Act it is provided by the Madras and Bombay Rules that a copy of the terms of the proposal should be sent to every creditor who has proved his debt (j).

366. Acceptance by creditors [P.-t. I. A., s. 28 (2); Prov. I. A., s. 38 (2)].—The proposal must be placed before a meeting of creditors (k). The debtor may at the meeting amend the terms of his proposal if the amendment is, in the opinion of the Official Assignee, under the Presidency-towns Insolvency Act, and, in the opinion of the Court, under the Provincial Insolvency Act, calculated to benefit the general body of creditors. The creditors entitled to vote are those whose debts are proved. The debts must have been proved in the manner prescribed by the Act (l). Under the Presidency-towns Insolvency Act, a creditor may, in order to entitle himself to vote, prove his debt even at the meeting; and the Official Assignee as chairman has power to accept or reject proof, but his decision is subject to appeal to the Court. If he is in doubt, he should allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained (m). The proposal will be taken to be accepted if a majority in number and three-fourths in value of all the creditors whose debts are proved resolve to accept. A creditor who does not vote in effect votes against the proposal. A creditor need not vote in person at the meeting. Under the Presidency-towns Insolvency Act, he may vote by proxy (n); he may also register his vote by a letter in the prescribed form addressed to the Official Assignee. Under the

(g) *Ganga Sahai v. Mukarram Ali Khan* (1926) 24 All. L. J. 441, 97 I. C. 556, ('26) A.A. 361.

(h) See Calcutta Rule 110; Madras Rule 54; Bombay Rule 101; Rangoon Rule 150.

(i) See Calcutta Provincial Rule 16; Madras Provincial Rule 10; Bombay Provincial Rule XI; Allahabad Provincial Rule 19.

(j) Madras Provincial Rule 10;

Bombay Provincial Rule XI.

(k) *Muhammad Asadullah Khan v. Sant Ram* ('26) A. L. 87, 89 L. C. 740.

(l) *Chandan Lal v. Khemraj* (1917) 15 All. L. J. 538, 40 I. C. 156. But see *Krishna Chandra Das v. Jotindra Nath Poria* (1928) 48 Cal. L. J. 574, 114 I. C. 415, ('29) A. C. 159.

(m) P.-t. I. A., Sch. I., rule 14.

(n) P.-t. I. A., Sch. I., rule 16.

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Provincial Insolvency Act, he may vote by a pleader (o). No scheme can be approved by the Court unless it has been accepted by the statutory majority (p). The essence of a composition or scheme is a proposal by the debtor and its acceptance by the creditors.

368. Application to Court to approve composition or scheme [P.-t. I. A., s. 29 (1), (2)].—Under the Presidency-towns Insolvency Act the insolvent or the Official Assignee may after the proposal is accepted by the creditors apply to the Court to approve it, and notice of the time appointed for hearing the application must be given to each creditor who has proved. Except where an estate is being summarily administered or special leave of the Court has been obtained, the application cannot be heard until after the conclusion of the public examination of the insolvent. There is no such provision in the Provincial Insolvency Act, but a similar practice prevails.

369. Approval of proposal by Court [P.-t. I. A., s. 29; Prov. I. A., s. 38 (4), (5), (6), (7)].—At the hearing any creditor who has proved may be heard by the Court in opposition to the application notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal; the reason is that such an acceptance is merely a resolution to entertain the proposal as one deserving consideration. The Court must, before approving the proposal, hear the report of the Official Assignee or Receiver as to the terms thereof and as to the conduct of the insolvent and any objections which may be made by or on behalf of any creditor.

Where the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or in *any case in which the Court is required to refuse the insolvent's discharge*, the Court is required to refuse to approve the proposal. The words in italics do not occur in the Provincial Insolvency Act. Where any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court is required to refuse to approve the proposal unless it provides reasonable security for payment, under the Presidency-towns Insolvency Act, of not less than four annas in the rupee, and under the Provincial Insolvency Act, of not less than six annas in the rupee, on all the unsecured debts provable against the debtor's estate. No composition or scheme can be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent. In any other case the Court has discretion to approve or refuse to approve the proposal.

(o) Prov. I. A., s. 38 (2).
(p) See *Behary Lal Sikdar v. Harsukh* |

Das Chakmal (1920) 25 C.W.N.
137, 61 I. C. 904.

370. Object of approval of Court.—The exercise of the power of approval is a duty imposed upon the Court for the twofold purpose of preventing a majority of creditors from dealing recklessly not only with their property, but with that of the minority, and of enforcing a more careful and moral conduct on the debtor's part. Dealing with this question Lord Esher, M.R., said in *Ex parte Reed* (q) : " In my opinion this Act was passed because it had been proved to the satisfaction of the legislature that a majority of creditors, however large, was not careful, and was not to be trusted : that on the contrary, the creditors were generally utterly careless, that they wrote off their debts as bad, and agreed to terms which might give some possibility—an evanescent chance—of their getting something out of the wreck. It was because of the known and proved behaviour of creditors with regard to their insolvent debtors that this Act was passed, taking away from the majority of creditors that power which they had so recklessly and carelessly used, and putting a controlling power into the hands of the Court for the purpose of protecting the creditors against their own recklessness ; for the purpose of preventing a majority of creditors from dealing thus recklessly, not only with their own property, but with that of the minority, and of enforcing, so far as the legislature could, a more careful and moral conduct on the part of debtors."

371. Matters to be taken into consideration.—Before approving the proposal the Court must hear any objections that may be made by or on behalf of the creditors. The Court must also hear the report of the Official Assignee or Receiver as to the terms of the proposal and as to the conduct of the insolvent. In making his report, it is the duty of the Official Assignee or Receiver to form his own judgment ; he should not be influenced by the wishes of the creditors (r). It is also his duty to report fully to the Court, and that duty is in no respect limited or diminished by the fact that he has approved the scheme and made a report to the creditors to that effect (s). Though it is not expressly provided by this section that the report is to be *prima facie* evidence of the statements contained in it as it is by sec. 39 (4) of the Presidency-towns Insolvency Act and sec. 42 (2) of the Provincial Insolvency Act, which relate to discharge, the report should be taken as such evidence on an application for the approval of a composition or scheme. The reason is that the Court has on such an application to consider all the matters which it has to do on an application for discharge (t). The opinion, however, of the Official Assignee or Receiver is not binding on the Court which has to form its own conclusion in the matter (u). The conduct of the insolvent is as material on the question of approving a composition or scheme as it is on

(q) (1886) 17 Q.B.D. 244, 250-251.

(r) *Ex parte Campbell* (1885) 15 Q.B.D. 213.(s) *Re Bottomley* (1893) 10 Morr. 262.(t) *Ex parte Campbell* (1885) 15 Q.B.D. 213.(u) *Re Burr* (1892) 2 Q.B. 467, 473.

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the question of his discharge, and the report should deal with it. As to discharge it is to be observed that under the Presidency-towns Insolvency Act the Court is *bound* to refuse a discharge where the insolvent has committed any offence punishable under secs. 102 and 103 of that Act or under secs. 421 to 424 of the Indian Penal Code (*v*). Under the Provincial Insolvency Act, there is no case in which the Court is *bound* to refuse a discharge (*w*), and this accounts for the omission of the words "or in any case in which the Court is required to refuse the insolvent's discharge" in sec. 38 (4) of the Provincial Insolvency Act.

372. Power of Court.—The granting of the bankrupt's application for the approval of the proposal is in every case in which it is permissible a matter entirely within the discretion of the Court (*x*). In some cases it is bound to refuse its approval, in some it is bound to refuse unless certain conditions are fulfilled; in all other cases, it may in its discretion approve or refuse to approve. The Court cannot alter the substance of a scheme submitted to it for approval (*y*).

373. When Court absolutely bound to refuse.—The Court is bound to refuse its approval—

- (a) if in its opinion the terms are not reasonable or are not calculated to benefit the general body of creditors; or
- (b) if the case be one in which the Court is required to refuse the insolvent's discharge [this requirement, as stated in para. 371 above, does not occur in the Provincial Insolvency Act]; or
- (c) if the proposal does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent (*z*).

The scheme must be both reasonable and calculated to benefit the general body of creditors. A scheme which gives the creditors no greater advantage than they would have in a bankruptcy, while it deprives them of some of the powers which they would have had and of the control of the Court over the administration of the estate, is neither reasonable nor calculated to benefit the general body of creditors (*a*). The scheme must be calculated to benefit, not merely the creditors who have agreed to it, but the general body of creditors—that is, all creditors, and not a limited

(*v*) P.-t. I. A., s. 39. This was also the English law, but s. 26 (2) of the B.A., 1914, was amended by the B.A., 1926, s.1 (*a*), and there is now no case in which the Court is required to refuse a discharge.

(*w*) See Prov. I. A., ss. 41 and 42.

(*x*) *Re Beer* (1903) 1 K.B. 628, 633.

(*y*) *Mamoojee Moosajee v. N. M. Meera Moideen Bros.* (1927) 5 Rang. 241,

103 I. C. 181, ('27) A.R. 176. As to Rules under the P.-t. I. A., see Cal. Rule 120, Bombay Rule 109, and Rang. Rule 154. See also *Lucas v. Martin* (1888) 37 Ch. D. 597.

(*z*) See P.-t. I. A., s. 49; Prov. I. A., s. 61.

(*a*) *Ex parte Bischoffsheim* (1887) 19 Q. B.D. 33.

portion of them (b). A scheme which provides that the debtor shall not be discharged until a committee appointed under the scheme so decide is unreasonable and *ultra vires*; the time for the discharge of an insolvent is to be fixed by the creditors subject to the approval of the Court and the discretionary power of the Court cannot be handed over to any one else (c).

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374. When Court bound to refuse unless certain conditions are fulfilled.—Where a proposal for a scheme of arrangement is submitted for the approval of the Court, and facts are proved, on proof of which the Court would be required either to refuse, suspend, or attach conditions to the insolvent's discharge (d), the Court *shall* refuse to approve the proposal, unless it provides reasonable security for payment, under the Presidency-towns Insolvency Act, of not less than four annas, and under the Provincial Insolvency Act, of not less than six annas in the rupee, on all unsecured debts provable against the debtor's estate. The Court has *no discretion* to approve the proposal unless it is satisfied that the scheme provides reasonable security for the payment of the minimum composition specified in the Acts. "Reasonable security" does not mean such security as a prudent man would invest money upon, but a reasonable commercial probability that the amount will be realised, having regard to the state of affairs presented to the creditors (e). Further, a scheme providing reasonable security must be a scheme which provides for payment forthwith or within a short time. A scheme which provides for payment at a distant time, as after a year, is not a scheme which can be said to provide "reasonable security" (f).

The mere fact that the minimum is reasonably secured is not sufficient; that is only the condition which entitles the Court to *consider* whether the scheme ought to be approved. Even if the scheme provides reasonable security, the Court is not bound to approve the scheme, for it has a discretion in the matter (g). In exercising its discretion the Court considers both the interest of the creditors and the conduct of the debtor. The interest of the creditors is in the first instance to prevail unless it would be contrary to commercial morality that they should be allowed to make an arrangement with the debtor. It is the duty of the Court, therefore, in each case to take into consideration the particular class of offence and the particular circumstance under which it is proved to have been committed, and then to ask itself the question whether it would be contrary to public morality, for the sake of private interests, to approve

(b) *Flint v. Barnard* (1889) 22 Q.B.D. 90, 94.

(c) *Ex parte Clark* (1884) 13 Q. B. D. 426.

(d) P.-t. I. A., s. 39 (2); Prov. I. A., s. 42 (1).

(e) *Re Bottomley* (1893) 10 Morr. 262,

273-274.

(f) *Re Paine* (1891) W. N. 208; *Re Webb* (1914) 3 K. B. 387, 392. See also *Re Flew* (1905) 1 K.B. 278.

(g) *Re Burr* (1892) 2 Q.B. 467.

Para. 374 the scheme. If the circumstances under which the offences were committed are such that, although he has done wrong, the debtor need not in the interests of the State be treated as a person with whom the creditors ought not to be allowed to negotiate, the Court is at liberty to approve the scheme, notwithstanding the commission of those offences (h). In *Ex parte Kearsley* (i) Lindley, L.J., said: "It is the duty of the Court to look, not only at the interests of the creditors, but also at the conduct of the debtor. Under some of the circumstances mentioned in sub-sec. 6 of sec. 18 [of the Bankruptcy Act, 1883], *however beneficial the composition or scheme may be to the creditors*, it is the duty of the Court by reason of the conduct of the debtor to refuse to sanction it." In the same case Lopes, L.J., said: "I understand it to be left to the discretion of the Court, when a composition appears reasonable, to determine whether the conduct of the debtor is such as to make it more expedient in the interest of the public to punish him than to consult only the interest of the creditors." Again in *Re Beer* (j), Romer, L.J., said: "In a case of this kind the Court ought to have regard to the interests of the public and of commercial morality—to the conduct of the bankrupt, on the one hand, and to the interest of the creditors on the other—and if the Court comes to the conclusion that however beneficial to the creditors the scheme may be, yet it is not in the interest of the public or of commercial morality that the bankruptcy should be annulled, it is their duty to refuse to annul it." Misconduct on the part of a bankrupt, to be sufficient to justify the Court in refusing its sanction to a scheme, must be of a gross character or must be such as to make the scheme contrary to public policy. In one case where the security provided by the scheme was reasonable, but the misconduct alleged against the bankrupt was that he contributed to his bankruptcy by rash and hazardous speculations, it was held that such misconduct was not by itself a sufficient ground for refusing approval of the scheme. Vaughan Williams, L.J., said: "To my mind, though there might be a case where the rash and hazardous speculations had been so continued or of such a character as to make it against public policy that a man who might be described as a confirmed gambler should get a scheme sanctioned at all, this is not a case of that sort" (k). In another case where the charges against the bankrupt were that he had omitted to keep usual and proper books of account, that he had contributed to his bankruptcy by rash and hazardous speculations, and that he had on two previous occasions been adjudged bankrupt, Fry, L.J., said: "I look not merely at the fact of these technical offences having been committed, but at his whole career as disclosed by the evidence, and I say that in such a case the Court ought to adjudicate upon the debtor's discharge, and to determine whether it should be refused,

(h) *Re Bottomley* (1893) 10 Morr. 262, 269, 270; *Motilal v. Ganpatram* (1915) 21 C.W.N. 936, 34 I. C. 792; *Mamoojee Moosajee v. N. M. Meera Moideen Bros.* (1927) 5

Rang. 241, 103 I. C. 181, ('27) A. R. 176.

(i) (1887) 18 Q.B.D. 168.

(j) (1903) 1 K. B. 628.

(k) *Re E. A. B.* (1902) 1 K. B. 457, 467.

or suspended, or granted subject to conditions. I regard this debtor as one of those plagues of society of whom there are too many, and upon whom I think it is the duty of the Bankruptcy Court to keep a sharp eye. In the exercise of my judicial discretion I therefore refuse to approve of this scheme " (l).

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375. Withdrawals and releases of debts.—In calculating how much can be paid in the rupee only those unsecured debts can be taken into account which are provable at the time when the scheme comes before the Court for approval. Debts existing at the date of the order of adjudication, but withdrawn or released before the Court is asked to approve the scheme, are not to be taken into account. It is no objection to the approval of a composition or scheme that withdrawals of some of the debts have been obtained on terms giving the withdrawing creditors an advantage over the others, provided that the withdrawals have not been obtained by the insolvent himself or with his knowledge. Thus where the withdrawals were obtained by the insolvent's brother without any knowledge on the part of the insolvent himself, it was held that it was not a ground for the Court refusing to sanction the scheme (m). The release or withdrawals must be absolute and not conditional on the approval of the scheme by the Court, and the circumstances under which they are obtained must be placed before the Court (n). There may, however, be cases in which the Court might approve of a scheme when the insolvent himself is a party to a conditional withdrawal of claims such as those of "family creditors," provided there is full disclosure of all the facts and of the negotiations for the scheme (o).

376. Annulment of adjudication [P.-t. I. A., s. 30 (1); Prov. I. A., s. 39].—Under both Acts if the Court approves the proposal, the terms must be embodied in an order of the Court, and the adjudication must be annulled. Omission to incorporate the terms of the proposal in the order is a mere formal defect which can be remedied at any time and does not affect the annulment (p). On annulment the provisions of sec. 23 (1) and (3) of the Presidency-towns Insolvency Act apply to cases under

(l) *Re Burr* (1892) 2 Q.B. 467.

(m) *Re E. A. B.* (1902) 1 K. B. 457. A secret preferential agreement, in the case of a common law composition, made by a compounding debtor with a creditor before the passing of a composition resolution is void as a fraud upon the creditors [*Ex parte Milner* (1885) 15 Q. B. D. 605], even if the creditor agreed, in consideration of such agreement, to stand surety for payment of the composition [*Wood v. Barker* (1866) L. R. 1 Eq. 1391]. Under the Bankruptcy Acts also it has been held that an

agreement by the debtor with one of his creditors, whilst the composition was unpaid, to pay him his debt in full, is void even though the agreement is made for a fresh consideration [*Ex parte Barrow* (1881) 18 Ch. D. 464].

(n) *Re Pilling* (1903) 2 K. B. 50.

(o) *Re Flew* (1905) 1 K. B. 278, 284

(p) *Bombay Company Limited v. The Official Assignee of Madras* (1921) 44 Mad. 381, 388, 63 I. C. 173, ('21) A. M. 236. See also *Ganga Sahai v. Mukarram Ali Khan* (1926) 24 All. L. J. 441, 97 I. C. 556, ('26) A. A. 361.

Paras. 376, 377 that Act, and the provisions of the corresponding sec. 37 of the Provincial Insolvency Act apply to cases under that Act. These sections relate to the consequences of annulment of adjudication.

377. Jurisdiction of Court after approval of composition.—The jurisdiction of the Insolvency Court does not terminate under either Act on the approval of a composition or scheme. Though the adjudication is annulled, the composition is made with the approval of the Insolvency Court and the Court retains jurisdiction to give effect to it (g). This is sometimes expressed by saying that proceedings in insolvency do not terminate on the annulment of adjudication on the approval of a composition or scheme (r). The effect of the approval of a scheme is to substitute the scheme for the bankruptcy. The scheme remains under the control of the Bankruptcy Court, and the general rules of bankruptcy apply.

It is provided by both the Acts that when an adjudication is annulled on approval of a composition or scheme by the Court, the provisions of the section relating to the consequences of annulment apply (s). The result is that the Court may vest the debtor's property in such person as the Court may appoint; if no such appointment is made the property reverts to the debtor. Rules to the same effect have been made by the High Courts of Calcutta, Bombay and Rangoon under the Presidency-towns Insolvency Act (t). It is provided by those Rules that when a composition or scheme is approved, the Official Assignee shall, on payment of all costs, charges and expenses, forthwith put the insolvent (or as the case may be the trustee under the composition or scheme or the other person or persons to whom under the composition or scheme the property of the debtor is to be assigned) into possession of the debtor's property. If no trustee is appointed under the composition or scheme, the Official Assignee shall, unless and until another trustee is appointed by the creditors, be the trustee for the purpose of administering the debtor's property and carrying out the terms of the composition or scheme as the case may be. In short, notwithstanding the annulment the insolvency continues in another form. The person in whom the debtor's property is vested has the same powers of realizing (u) and distributing the estate as the Official Assignee or Receiver. A creditor who has obtained a decree against the debtor will be restrained from executing it notwithstanding the annulment (v). Questions relating to proof of debts (w), set-off and priority of debts will also be determined according to the rules of insolvency. In *West v.*

(g) *Re Lennard* (1875) 1 Ch. D. 177, 178-179; *Re Krishna Kishore Adhicary* (1927) 54 Cal. 650, 653, 105 I. C. 90, ('28) A.C. 21.

(r) *Kamireddi Timappa v. Devasi Harpal* (1929) 56 Mad. L. J. 458, 115 I. C. 815, ('29) A.M. 157; *Jethaji Peraji Firm v. Krishnayya* (1929) 52 Mad. 648, 658.

(s) P.-t. I. A., s. 23 (1) and (3); Prov.

I. A., s. 37.

(t) Calcutta Rules 121-122; Bombay Rules 109A-110; Rangoon Rules 155-156.

(u) See *Motharam Daulatram v. Pahlajrai Gopaldas* (1925) 80 I. C. 141, ('25) A.S. 159.

(v) *Re Lennard* (1875) 1 Ch. D. 177.

(w) (1929) 56 Mad. L. J. 458, 115 I. C. 815, ('29) A.M. 157, *supra*.

Baker (x), a person in whom the estate of the bankrupt was vested sued the defendant for a debt due to the bankrupt. The defendant claimed a set-off to which he would have been entitled as against the trustee in bankruptcy if the adjudication had not been annulled. It was held that the vesting order vested the property of the bankrupt in the plaintiff subject to the right to set off debts which would have been provable in bankruptcy. Cleasby, B., said: "The question is, whether the effect of the 28th section [of the Bankruptcy Act, 1869,] was to alter the status of the defendant because of the substitution of a scheme of settlement for the bankruptcy. On looking at the section the effect appears to be that, instead of the trustee dealing with the estate, the creditors shall be at liberty to accept a composition. This, though accompanied by the annulling the bankruptcy, does not take the matter out of the Bankruptcy Court, so as to prevent the general rules of bankruptcy applying, or alter the position of the parties except so far as it may be altered by the agreement they have come to to take the composition instead of the estate. By sec. 28 the provisions of a composition or general scheme made in pursuance of the Act may be enforced by the Court in a summary manner, and are to be binding on all the creditors so far as relates to any debts due to them and provable under the Bankruptcy Act. That clearly shows that the Bankruptcy Court still retains the scheme under its control, and therefore it is subject to the ordinary rules of that Court as to set off." In the same case Pollock, B., said: "The only question is the sense in which the word 'annulled' is used. Before this Act, there were two modes of proceeding open, either to go on under the bankruptcy, or to annul the proceedings altogether. Now, however, there is an *intermediate* course by which the control of the Court is retained, and the annulling of the bankruptcy only means that there shall be no adjudication of bankruptcy in the ordinary way, *but the proceedings shall be moulded on the terms of the composition, under the direction of the Court.*" The same rule, it is submitted, will apply even if no order is made vesting the property of the debtor in another person and the property in consequence reverts to the debtor (y) which, however, is unlikely. The provisions as to re-adjudication in sec. 31 of the Presidency-towns Insolvency Act and the corresponding sec. 40 of the Provincial Insolvency Act lend support to this view.

378. Effect of approval of composition on rights of creditors under Presidency-towns Insolvency Act (ss. 30, 32).—A composition or scheme approved by the Court under the Presidency-towns Insolvency Act is binding on all the creditors, *whether they have assented to it or not*, so far as relates to any debts due to them from the insolvent and provable in

(x) (1875) 1 Ex. D. 44.

(y) The contrary was held in *Crew v. Terry* (1877) 2 C.P.D. 403, but the composition in that case was

confined to "debts proved and admitted in bankruptcy," and did not extend to "all debts provable in bankruptcy."

Para. 378 insolvency (z), but it is not binding on any creditor so far as regards a debt or liability from which under sec. 45 of that Act the insolvent could not be released by an order of discharge in insolvency, unless the creditor assents to the composition or scheme.

By sec. 29 the Court is required to take the same matters into consideration upon an application for the approval of a composition or scheme as upon an application for a discharge in insolvency, but it does not follow that when a composition or scheme is approved by the Court the order approving the scheme is *of itself* an order of discharge. Under sec. 30, however, it has the *effect* of an order of discharge, and is *equivalent* to it (a). Sec. 30 was "intended to give as extended relief to a compounding debtor as a discharge in bankruptcy gives to a bankrupt" (b). When a composition or scheme is accepted and approved the debtor gets the "same absolute relief as is given by a discharge in bankruptcy" (c). "The operation of a composition is to be co-extensive with that of bankruptcy—a conclusion which is confirmed by" sec. 32 of the Act (d). All debts and liabilities provable in insolvency become barred under a composition or scheme just as they would in the course of the insolvency proceedings if the debtor were adjudged insolvent and had obtained his discharge. In short, a composition or scheme duly approved by the Court has the same effect as an order of discharge. No action will lie on the original debt (e), nor can a creditor who has obtained judgment against the debtor issue execution on it (f). The effect of approval of a composition by the Court is to substitute a right to be paid a composition in place of the original debt (g). The creditors have only such rights as the composition or scheme gives them. Even if default is made in payment, the original debt does not revive and the creditor cannot bring an action on the original debt. He can only enforce payment of the composition which is due to him (h). The Rules provide that a creditor who has not proved his debt before approval may lodge his proof with the trustee under the composition or scheme, if any, and if there is no such trustee, with the Official Assignee who must admit or reject the same. No creditor is entitled to enforce payment of any part of the sums payable under a composition or scheme unless and until he has proved his debt and

- (z) As to what debts are provable in insolvency, see P.-t. I. A., s. 46.
 (a) *Ex parte Clark* (1884) 13 Q.B.D. 426, 435; *Re Croom* (1891) 1 Ch. 695, 700-704; *Flint v. Barnard* (1888) 22 Q.B.D. 90; *Ganpat Rai v. Kani Ram* (1926) 24 All. L. J. 283, 92 I. C. 535, ('26) A.A. 293; *Re Krishna Kishore Adhicary* (1927) 54 Cal. 650, 653, 105 I.C. 90, ('28) A.C. 21.
 (b) *Flint v. Barnard* (1888) 22 Q.B.D. 90, 95.

- (c) *Ibid*, p. 93.
 (d) *Ibid*, p. 95.
 (e) *Flint v. Barnard* (1888) 22 Q.B.D. 90; *Ganpat Rai v. Kani Ram* (1926) 24 All. L.J. 283, 92 I. C. 535, ('26) A.A. 293.
 (f) *Seaton v. Lord Deerpur* (1895) 1 Q.B. 853.
 (g) *Re Orpen* (1880) 16 Ch.D. 202, 206.
 (h) *Govindas Chaturbhujadas v. Ramados* (1925) 48 Mad. 521, 90 I.C. 92, ('25) A.M. 593; *Ex parte Godfrey* (1887) 18 Q.B.D. 670, 673.

his proof has been admitted (i). The mere fact that a mortgage has been recited in the composition does not dispense with proof of the debt (j). In some of the Indian cases where the creditor had not proved his debt before annulment the debtor contended that the approval of the composition operated as a discharge, and that he was not liable to pay even the amount under the composition, but the Courts rightly held that the creditor was entitled to such payment under the composition on proof of his debt (k).

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The question as to how far the approval of a scheme is equivalent to a discharge becomes important when by a scheme the whole of the debtor's property is vested in a trustee for the payment of his debts, and the debtor acquires property *after* the approval of the scheme. This happened in *Re Croom* (l). In that case after approval of the scheme the debtor's uncle died leaving a will whereby he bequeathed a legacy to the debtor. The trustee claimed it as property vested in him under the scheme, but it was held that the only property which passed under the scheme to the trustee was property to which the debtor was entitled at the date of its acceptance by the creditors and up to the date of its approval by the Court, the approval of the scheme by the Court being equivalent to an order of discharge.

What debts sec. 30 includes.—A creditor whose proof has been rejected by reason of the debt being a gambling debt is bound by the scheme, though he is precluded by reason of the rejection from receiving a dividend under it (m). A composition or scheme duly approved is also binding on the Crown in respect of Crown debts (n). The words “any debt provable in insolvency” in sec. 30 are not confined to debts properly so called. They include a liability provable in insolvency such as a liability to pay damages for breach of a covenant to repair (o).

379. Effect of approval of composition on rights of creditors under Provincial Insolvency Act (s. 39).—Sec. 39 of the Provincial Insolvency Act provides that if the Court approves the composition or scheme, it shall frame a schedule in accordance with the provisions of sec. 33, and the order of adjudication shall be annulled, and the composition or scheme shall be binding on all the creditors entered in the schedule so far as relates to any debts entered therein. Under this Act a creditor who is not a party to a composition or scheme and whose name is not entered in the schedule is not bound by it and he may recover the full amount of his claim by a suit against the

(i) See Calcutta Rule 128 and Bombay Rule 115.

(j) *Re Kanhya Lal Sewbux* (1926) 53 Cal. 448, 90 I.C. 449, ('26) A.C. 176.

(k) *Govindas Chaturbhujdas v. Ramados* (1925) 48 Mad. 521, 90 I.C. 92 ('25) A. M. 593; *Kamireddi Timappa v. Devasi Harpal* (1929)

56 Mad. L. J. 458, 115 I. C. 815, ('29) A. M. 157.

(l) (1891) 1 Ch. 695.

(m) *Seaton v. Lord Deerhurst* (1895) Q. B. 853.

(n) P.-t. I. A., s. 120.

(o) *Flint v. Barnard* (1889) 22 Q. B. D. 90.

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debtor (p). If he finds that there are no prospects of realising his claim by a suit, he is entitled to come in and prove his claim and receive dividends under the composition, but he cannot disturb any former dividend (q). It will be seen that there is a substantial difference between the two Acts as to the binding effect of a composition or scheme. Under the Presidency-towns Insolvency Act the composition or scheme is binding on all creditors whether they have assented to it or not. Under the Provincial Insolvency Act it does not bind any creditor who has not assented to it. Dealing with the difference between the two Acts, Thiruvengkatachariar, J., said: "I cannot help observing that there does not seem to be any sufficient reason for the order of annulment passed in consequence of the Insolvency Court approving the composition having different results under the two Acts, or why the provision in the Presidency-towns Insolvency Act on that question which seems to me the more appropriate one and which follows the corresponding provision in the English Bankruptcy Act is less suitable to annulments of adjudications under sec. 39, Provincial Insolvency Act" (r). It may be observed that sec. 39 of the Provincial Insolvency Act, 1920, is a reproduction of sec. 27 (7) of the Provincial Insolvency Act, 1907.

Under the Provincial Insolvency Act, 1907, an order of discharge released the insolvent from "all debts entered in the schedule" (s), and it was therefore appropriate that in the case of a composition also the debts to be barred should be the debts entered in the schedule prepared by the Court under sec. 27 (7) of that Act. Under the Act of 1920 an order of discharge releases the insolvent from "all debts provable under the Act" (t). It looks as if the legislature while enlarging the operation of an order of discharge under the Act of 1920 lost sight of the provisions of sec. 39 of the Act of 1920. I think it is desirable to consider whether sec. 39 of the Provincial Insolvency Act should not be amended by substituting the words "the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable under the Act," for the words "the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein."

379A. Creditor's remedy in default of payment under Presidency-towns Insolvency Act [sec. 30 (2)].—Under the Presidency-towns Insolvency Act the payment of any instalment due under a composition may be enforced by an application to the Court as provided by sec. 30 (2) of the Act. That section says that the provisions of the composition or scheme may be enforced by the Court on an application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court. In England it is provided by the

(p) *Khalil-ul-Rahman v. Ram Surup* (1926) 7 Lah. 232, 93 I.C. 954, ('26) A.L. 488; *Meghraj Navandram v. Virbhandas Sirumal* (1924) 76 I. C. 250, ('24) A. S. 122; *Motumal v. Ghanshamdas* ('29) A. S. 204.

(q) *Kamireddi Timappa v. Devasi*

Harpal (1929) 56 Mad. L. J. 458, 115 I. C. 815, ('29) A.M. 157.

(r) *Kamireddi Timappa v. Devasi Harpal* (1929) 56 Mad. L. J. 458, 115 I. C. 815, ('29) A.M. 157, 166.

(s) *Prov. I. A., 1907, s. 45 (2).*

(t) *Prov. I. A., 1920, s. 44.*

Bankruptcy Rule 215 that where a composition or scheme has been approved, and default is made in any payment thereunder, either by the debtor or the trustee (if any), no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the Court (u), Rules in exactly the same terms have been made by the High Courts of Calcutta (v) and Bombay (w). No such rule has been made by the High Court of Madras or the other High Courts. In a Madras case (x) it was held that in the absence of any such rule the creditor was not restricted to the summary remedy provided by sec. 30 (2) and that he could bring an action on the basis of the composition. In that case the debtor's property had been handed over to him, and the Court held that though the plaintiff had a concurrent remedy by separate action, it would have referred him to the summary remedy provided by sec. 30 (2) had there been any scheme and trustees appointed under it. Though this decision may be correct, some of the grounds on which it is based are not satisfactory. For instance, the learned Judges relied in support of the decision on sec. 126 of the Bankruptcy Act, 1869, and cases decided under that section. Under that section a composition is binding only on those creditors whose names are shown in the statement of the debtor produced to the meetings at which the resolution accepting the composition was passed, but it does not affect or prejudice the rights of any other creditors. One of the learned Judges after referring to that section said: "In the Bankruptcy Act of 1883 this provision [that is sec. 126] was not repeated, but sec. 18, clause (8), of that Act, provided: 'A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy'." The fact is that sec. 126 of the Act of 1869 deals with composition "without any proceedings in bankruptcy," a subject which is now dealt with in the Deeds of Arrangement Act, 1914. The section of the Act of 1869 material to the case before the Court was sec. 28. That section provides *inter alia* that "the approval of the Court . . . shall be binding on all the creditors so far as relates to any debts due to them and provable under the bankruptcy," and this provision is repeated in sec. 18 (8) of the Bankruptcy Act, 1883.

379B. Creditor's remedy in default of payment under Provincial Insolvency Act.—There is no summary remedy provided by the Provincial Insolvency Act for default in payment of instalments under the composition as in the Presidency-towns Insolvency Act. The reason is that a provincial Court has no power to commit for contempt of Court. Under the Provincial Insolvency Act, if default is

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(u) This was Rule 211 under Bankruptcy Act, 1883.

(v) Rule 124.

(w) Rule 112.

(x) *Govindas Chaturbhujdas v. Ramdas*
(1925) 48 Mad. 521, 90 I. C. 92,
(1925) A.M. 593.

Paras. 79B-384A made in payment under a composition or scheme, a suit is the only remedy. It is for consideration whether provision should not be made in that Act for enforcing payment of a composition by a proceeding in the nature of execution.

380. Secured creditors.—A secured creditor need not take any part in the composition proceedings, and when he has realised his security he may come in and *prove* for the deficiency, if any, on the footing of the composition (y). In Madras it has been held that if the debtor's property has been handed over to him and there is no scheme and no trustee, a secured creditor who has realized his security is entitled to *sue* the debtor for the deficiency on the basis of the composition, and that he is not confined to the summary remedy provided by sec. 30 of the Presidency-towns Insolvency Act (z). The learned Judges relied upon *Re Hardy* (a) as an authority for the proposition that a secured creditor can maintain such an action, but that case, it is submitted, is not an authority for that proposition (b).

381. Expunging debts from schedule.—After a composition or scheme has been accepted by the creditors, the Court may, on the application of the insolvent, hold an inquiry and expunge or reduce a proof (c).

382. Right of trustees to sue.—After an adjudication is annulled on the approval of a composition, the right to sue for debts or for damages for breach of contract due to the insolvent vests in the trustees appointed under the composition if the estate of the insolvent is vested in them (d).

383. Costs of Official Assignee or Receiver.—Under the Presidency-towns Insolvency Act where an adjudication is annulled on the approval of a composition or scheme, the costs of the Official Assignee come out of the estate of the insolvent (e). The rule is the same under the Provincial Insolvency Act (f).

384. Revesting of property in insolvent on annulment.—Where an adjudication is annulled on the approval of a composition or scheme by the Court, the property of the debtor who has been adjudged insolvent vests in such person as the Court may appoint for the purpose of securing or bringing about the payment of the composition. In default of any such appointment, it reverts to the debtor (g).

384A. Power to re-adjudge debtor insolvent [P.-t. I. A., s. 31; Prov. I. A., s. 40].—If default is made in the payment of any instalment

(y) *Re Hardy* (1896) 1 Ch. 904. See also *McMurdo* (1902) 2 Ch. 684.

(z) *Govindas Chaturbujadas v. Ramados* (1925) 48 Mad. 521, 90 I. C. 92, ('25) A.M. 593, *supra*.

(a) (1896) 1 Ch. 904.

(b) See (1896) 1 Ch. 904, at p. 910.

(c) *Re Benoist* (1909) 2 K.B. 784; *Ganga Sahai v. Mukarram Ali Khan* (1926) 24 All. L. J. 441, 443, 97 I. C. 556, ('26) A. A. 361. See

P.-t. I. A., Schedule II, Rule 27; Prov. I. A., s. 50 (2).

(d) *Motharam Daulatram v. Pahlajrai Gopaldas* ('25) A.S. 159, 80 I.C. 141.

(e) See Calcutta Rule 121; Bombay Rule 109A; Rangoon Rule 155.

(f) *Arjun Das v. Fazil* ('29) A.L. 89, 110 I. C. 305.

(g) P.-t. I. A., s. 23; Prov. I. A., s. 37; *Flower v. Lyme Regis Corporation* (1921) 1 K.B. 488.

due in pursuance of any composition or scheme, approved as aforesaid, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, re-adjudge the debtor insolvent and annul the composition or scheme, and the property of the debtor shall thereupon vest in the Official Assignee but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. Where a debtor is re-adjudged insolvent as provided above, all debts otherwise provable which have been contracted before the date of such re-adjudication will be provable in the insolvency.

385. Re-adjudging debtor insolvent.—The Acts provide for a fresh adjudication on default or if the composition or scheme cannot proceed without injustice or undue delay or if the approval of the Court is obtained by fraud. The Court will not ordinarily annul a composition or scheme and re-adjudge the debtor insolvent if in its opinion the creditors will not be benefited by such order (*h*).

386. Death of insolvent after approval of composition or scheme.—Where a composition or scheme has been approved and subsequently annulled, and the debtor dies after the scheme has been approved and before it is annulled, any person interested may apply that the debtor be re-adjudged insolvent for the purpose of the further administration in insolvency of the estate of the deceased insolvent (*i*).

387. Liability of surety after annulment of composition or scheme.—Where a composition or scheme is annulled, and the debtor is re-adjudged insolvent, the liability of the surety who had covenanted to pay the composition comes to an end, and he cannot be sued upon the covenant (*j*).

389. Debts contracted before date of re-adjudication.—Where a debtor is re-adjudged insolvent, debts validly contracted by him while the composition or scheme was in force remain effective and are provable in the subsequent insolvency to the same extent as if there had been no previous proceeding in insolvency.

390. Insolvency Rules as to composition and schemes of arrangement.—As to Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 110-128; Bombay Rules 101-115; Madras Rule 54; Rangoon Rules 150-162.

As to Rules under the Provincial Insolvency Act, see Calcutta Rule 16; Madras Rule X; Bombay Rule XI; Allahabad Rule 19.

(*h*) *Re Krishna Kishore Adhicary* (1927)
54 Cal. 650, 105 I. C. 90, ('28)
A.C. 21.

(*i*) *Re Hardy* (1896) 1 Ch. 904; (1927)
54 Cal. 650, 105 I.C. 90, ('28)

A.C. 21, *supra*.
(*j*) *Govind Das Pity v. Jardine Skinner
& Co.* (1923) 27 C.W.N. 908, 80
I.C. 849, ('24) A.C. 176.

LECTURE VII.

PART II.

DISCHARGE OF INSOLVENT.

P.-t. I. A., ss. 38-45 ; Prov. I. A., ss. 41-44.

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391. Historical review.—There was no provision in the earlier bankruptcy statutes for relieving bankrupts from their debts even when they had conformed in all respects to the law of bankruptcy. A provision for their relief was first introduced by the statute 4 Anne, c. 17. Under that statute if a specified majority of the creditors signed a certificate called the certificate of conformity and the certificate was confirmed by the Lord Chancellor, it exonerated the bankrupt and his after-acquired property from the debts provable in his bankruptcy. This provision, however, left the bankrupt to the mercy of his creditors and a statutory provision was made in the reign of Queen Victoria (a) by which the granting of certificates of conformity was left to the discretion of the Court. By the Bankruptcy Act, 1849 (b), certificates of conformity were classified according as the bankruptcy had or had not arisen from unavoidable losses and misfortune. Certificates of conformity were abolished by the Bankruptcy Act, 1861, and an order of discharge was substituted for a certificate of conformity. The Bankruptcy Act, 1869, conferred a certain amount of power upon the creditors in the matter of the bankrupt's discharge, but this power was taken away by the Bankruptcy Act, 1883. Since then the power of granting a discharge has been vested in the Court of Bankruptcy. Under sec. 28 of the Bankruptcy Act, 1883, the power to make an order of discharge was discretionary with the Court, but that power was controlled by certain restrictions. Some of those restrictions were abolished by the Bankruptcy Act, 1890, and some by the Bankruptcy Act, 1926. Some restrictions still remain and they are referred to in their proper place in this Lecture.

392. Application for discharge [P.-t. I. A., s. 38 (1); Prov. I. A., s. 41 (1)].—A debtor may at any time after the order of adjudication apply to the Court for an order of discharge, and the Court is required to appoint a day for the hearing of the application. Such day, under the Presidency-towns Insolvency Act, must not be before the public examination of the debtor has been concluded. After his public examination the debtor is not entitled to wait for an indefinite period for applying for his discharge, and Rules (c) have been made under that Act by almost every High Court by which it is provided that if the debtor does not apply for his discharge within a specified period, the Court *may* annul the adjudication (see sec. 41 of the Act). Under the Provincial Insolvency Act the

(a) 5 and 6 Vict., c. 122, s. 39.

(b) B. A., 1849, ss. 198, 201, 205.

(c) Cal. Rule 142 A ; Bom. Rule 136 ; Rang. Rule 177.

Court is required by sec. 27 to specify the period within which the debtor shall apply for his discharge. If he does not apply within the specified period, the Court is required to annul the adjudication under sec. 43 of the Act.

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393. Notice [P.-t. I. A., s. 40; Prov. I. A., s. 41 (1)].—Notice of the time and place of the hearing of the application must be given in the manner prescribed by the Rules. The Rules also prescribe to what persons notice is to be given, some Rules providing that the notice is to be given only to such creditors as have proved and some that it is to be given to all creditors who have filed their claims (*d*).

394. Report of Official Assignee or Receiver.—Under the Presidency-towns Insolvency Act, sec. 79 (2) (a), it is the duty of the Official Assignee to investigate the conduct of the debtor and to report to the Court upon any application for discharge, stating whether there is reason to believe that the insolvent has committed any act which constitutes an offence under that Act or under secs. 421 to 424 of the Indian Penal Code in connection with his insolvency or which would justify the Court in refusing, suspending or qualifying an order for his discharge. There is no section in the Provincial Insolvency Act imposing a duty upon the Receiver to make a report, but the Rules made by some of the High Courts provide for the making of a report by the Receiver (*e*). Apart from the Rules, the Court may, under the Provincial Insolvency Act, require the Receiver to make a report as to the insolvent's conduct and affairs. The report of the Official Assignee or Receiver is, for the purposes of an application for discharge, *prima facie* evidence of the statements therein contained (*f*); it is not conclusive, and the Court is entitled to look into the evidence on which the findings under the report are based (*g*).

395. Hearing of application [P.-t. I. A., s. 38 (2); Prov. I. A., s. 41 (2)].—The application is heard in open Court. On the day fixed the Court hears the debtor as well as the creditors as provided by the Rules. It may also hear the Official Assignee or Receiver. The Court may put such questions to the debtor and receive such evidence as it may think fit for the purpose of ascertaining whether besides the facts mentioned in sec. 39 (2) of the Presidency-towns Insolvency Act and the corresponding sec. 42 (1) of the Provincial Insolvency Act, there are circumstances which might be material to the exercise of the discretion vested in the Court to grant or refuse the discharge or to make a conditional order of discharge. The only limit to the evidence

(*d*) As to Rules under P.-t. I. A., see Cal. Rule 132; Mad. Rule 70; Bom. Rule 125; Rang. Rule 165. As to Rules under Prov. I. A., see Cal. Rule 9; All. Rule 9.

(*e*) Madras Provincial Rule XVI; Bombay Provincial Rule XVII.

(*f*) P.-t. I. A., s. 39 (4); Prov. I. A., s. 42 (2).

(*g*) *Re Oswald* (1892) 9 Morr. 202.

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which may be received is its relevancy to the exercise of that discretion (h). No creditor is bound to oppose the discharge of an insolvent. If, however, he agrees not to oppose the discharge in consideration of a money payment, the agreement is illegal as tending to pervert the course of justice. The creditor cannot recover payment under such an agreement, and if money has already been paid by the debtor or his friend, neither of them can recover if the agreement has been partly performed (i).

396. Discretion of Court.—An absolute order of discharge restores the insolvent to his original status and makes a free man of him again. It releases him from all debts except those specified in the Acts (j). “The overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt should be free immediately; he must pass through a period of probation; and theoretically there may be cases in which he should not be free at all, but *prima facie* he has to give up everything he has and on doing that he is to be made a free man” (k).

The Court has a very wide discretion as to whether or not to grant an order of discharge, and, if so, upon what terms. In considering the question of an insolvent's discharge the Court is bound to have regard not to the interests of the insolvent or of the creditors alone, but also to the interests of the public and of commercial morality (l). The question whether an insolvent is to obtain his discharge or not is always one which affects the interests of the public. The fact that a bankruptcy offence committed by the debtor has been condoned by the injured party is therefore immaterial (m). The discretion is to be exercised on judicial principles (n). The Appellate Court will not readily interfere with the exercise of his discretion by the trial Judge if he has taken a right view of the facts; but if he has come to a wrong conclusion of fact with regard to the insolvent's conduct, it will vary his decision and exercise its own discretion as to what order to make (o).

397. Matters to be considered by the Court.—Before making the order the Court must take into consideration the report of the Official Assignee or Receiver. The Court is not confined to the particular offences and facts the proof of which imposes a statutory restriction on its discretion (p),

(h) *Re Barker* (1890) 25 Q. B. D. 285, 297.

(i) *Naoroji v. Kazi Sidick* (1896) 20 Bom. 636; *Kearley v. Thomson* (1890) 24 Q. B. D. 742. See Indian Contract Act, 1872, s. 23.

(j) P.-t. I. A., s. 45; Prov. I. A., s. 44.

(k) *Per Vaughan Williams, L.J.*, in *Re Gaskell* (1904) 2 K. B. 478, 482; *Sitaram v. Redden* 91 I.C. 760, ('26) A. C. 529.

(l) *Re Badcock* (1886) 3 Morr. 138, 144.

(m) *Re Stainton* (1887) 19 Q. B. D. 182, 185, 4 Morr. 242.

(n) *Re Stainton* (1887) 19 Q. B. D. 182, 4 Morr. 242.

(o) *Ex parte Castle Mail Packets Co.* (1886) 18 Q. B. D. 154; *Re Sultzberger* (1887) 4 Morr. 82.

(p) See P.-t. I. A., s. 39 (2); Prov. I. A., s. 42 (1).

or to matters pertaining to the duties of the insolvent as to the realization and distribution of his property (q). It may in the exercise of its discretion take into consideration any conduct or affairs of the insolvent relevant to the insolvency, but not any conduct which could not have anything to do with the insolvency either by producing it or by affecting it in any way after its commencement. Thus a judgment against an insolvent for breach of promise of marriage which occurred several years before the insolvency and which could have no connection with the insolvency ought not to be taken into consideration; but where such a judgment and non-payment of damages under it produced the insolvency, the insolvent's conduct in respect of the breach of the promise of marriage should be taken into consideration (r). As regards the duties imposed upon the insolvent by the Acts, they relate to the realisation and distribution of his property. These duties the insolvent is bound to perform, but he is not bound to comply with a merely moral obligation. Refusal to submit to a medical examination to enable the Official Assignee or Receiver to insure his life is a refusal to comply with a moral obligation, and it is not a ground upon which his discharge can be refused or suspended (s).

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398. Powers of Court as to discharge [P.-t. I. A., ss. 38 (2), 39 (3); Prov. I. A., ss. 41 (2), 42 (3)].—Under sec. 38 (2) of the Presidency-towns Insolvency Act and the corresponding sec. 41 (2) of the Provincial Insolvency Act the Court has an “almost indefinite” discretion to grant or refuse an order of discharge, except in so far as such discretion is limited by the provisions of the next section of each Act (t). In the exercise of that discretion the Court may either—

- (1) grant an absolute order of discharge; or
- (2) refuse an absolute order of discharge [which includes the power to refuse the discharge absolutely]; or
- (3) suspend the operation of the order for a specified period; or
- (4) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property; or
- (5) exercise the above powers of suspending and attaching conditions to an insolvent's discharge under heads (3) and (4) concurrently, that is, it may suspend the operation of the order for a *specified* period and at the same time attach *conditions* to the order for payments out of the future earnings or property of the insolvent (u).

(q) See P.-t. I. A., s. 33; Prov. I. A., ss. 22, 28 (1), 69 (a).

(r) *Re Barker* (1890) 25 Q. B. D. 285; *Re Cook* (1889) 6 Morr. 224, 61 L.T. 335.

(s) *Board of Trade v. Block* (1888) 13 App. Cas. 570.

(t) *Re Barker* (1890) 25 Q. B. D. 285, 292.

(u) P.-t. I. A., s. 39 (3); Prov. I. A.,

s. 42 (3); *Re Walmsley* (1907) 98 L. T. 55. Under the B. A., 1883, the Court had no power to make an order of suspension with conditions attached to it: see *Ex parte Huggins* (1889) 22 Q. B. D. 277. This power was first conferred by the Bankruptcy Act, 1890, sec. 8 (7), now B. A., 1914, s. 26 (8).

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A discharge may be suspended for a specified period or it may be made to take effect immediately. An order of discharge which is to take effect immediately and to which no conditions are attached is an absolute order of discharge, otherwise called an immediate *unconditional* order of discharge. An immediate unconditional order of discharge is to be distinguished from an order of discharge granted subject to conditions as to payments out of the insolvent's future earnings. Such a discharge also is immediate, but it is *conditional*.

The limitations on the discretion of the Court may now be considered. There are two such limitations under the Presidency-towns Insolvency Act, and one under the Provincial Insolvency Act.

399. Restrictions on powers of Court under Presidency-towns Insolvency Act, sec. 39.—Under sec. 39 of the Presidency towns Insolvency Act the Court is bound in some cases absolutely to refuse an order of discharge [para. 400]; in some cases it is bound to refuse an immediate unconditional discharge [paras. 401, 403].

400. Absolute refusal of discharge under Presidency-towns Insolvency Act, sec. 39 (1).—The Court must absolutely refuse the discharge in all cases where the insolvent has committed any offence specified in sec. 103 of the Presidency-towns Insolvency Act (v) or under secs. 421 to 424 of the Indian Penal Code.

The offences mentioned in sec. 103 of the Act relate to fraudulent concealment of the insolvent's state of affairs by destruction of documents, keeping false books or making false entries, fraudulently giving undue preferences or discharging or concealing debts or making away with property. The offences under secs. 421 to 424 of the Indian Penal Code relate to fraudulent deeds and dispositions of property. Sec. 421 deals with fraudulent concealment of property to prevent its distribution amongst creditors; sec. 422 relates to the offence committed by fraudulently preventing debts from being available for creditors; sec. 423 deals with fraudulent transfers containing false statements relating to the consideration for the transfer; and sec. 424 deals with dishonest or fraudulent removal or concealment of property. The section says "has committed any offence." The words "has committed" mean "has been tried and convicted for committing by the ordinary criminal Courts". The Insolvency Court has no jurisdiction to try criminal offences mentioned above (w). Those offences are known as major offences. It can try only the minor offences mentioned in sec. 39 (2) of the Presidency-towns Insolvency Act and the corresponding sec. 42 (1) of the Provincial Insolvency Act, which, if proved, require the Court to refuse an immediate unconditional discharge.

(v) It is not certain whether the offence specified in sec. 102 is also included.

(w) *Re Wood* (1915) H. B. R. 53. See also F.-t. I. A., s. 104.

The first part of sec. 39 of the Presidency-towns Insolvency Act which makes it imperative on the Court to refuse a discharge in cases where the insolvent has committed the offences mentioned in it is based on sec. 28 of the Bankruptcy Act, 1883. Under that section the Court of Bankruptcy was bound to refuse the discharge in cases where the bankrupt had committed any felony or misdemeanour connected with his bankruptcy. Sec. 28 of the Bankruptcy Act, 1883, was replaced by sec. 8 of the Bankruptcy Act, 1890. That section provided that the Court must refuse the discharge in cases where the bankrupt had committed any felony or misdemeanour *unless for special reasons the Court otherwise determines*. Sec. 8 of the Act of 1890 was reproduced with certain changes in sec. 26 of the Bankruptcy Act, 1914. Sec. 26 was amended by the Bankruptcy Act, 1926. As a result of that amendment there is now no case in the English law in which the Court is bound absolutely to refuse an order of discharge. The same was the law under the Bankruptcy Act, 1869 (b). The provisions of the Provincial Insolvency Act of 1907 as well as that of 1920 are in this respect on the lines of sec. 48 of the Bankruptcy Act, 1869. It is worth considering whether the restriction on the powers of the Court imposed by sec. 39 of the Presidency-towns Insolvency Act in cases where the insolvent has committed the offences specified in that section should not be removed.

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401. Refusal of immediate unconditional discharge under Presidency-towns Insolvency Act, Sec. 39 (1) & (2).—Under the Presidency-towns Insolvency Act, the Court must, on proof of any of the facts hereinafter mentioned (see para. 403), make one of the following four orders (y), that is, it must either—

- (a) refuse the discharge absolutely ; or
- (b) suspend the discharge for a specified time ; or
- (c) suspend the discharge until a dividend of not less than four annas in the rupee has been paid to the creditors ; or
- (d) require the insolvent as a condition of his discharge to consent to a decree being passed against him in favour of the Official Assignee for any balance or part of any balance of the debts provable under the insolvency which is not satisfied at the date of his discharge ; such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the insolvent in such manner and subject to such conditions as the Court may direct ; but in that case, the decree shall not be executed without the leave of the Court, which leave may be given on proof that the insolvent has since his discharge acquired property or income available for payment of his debts.

(x) B. A., 1869, s. 48.
(y) *Re Kutner* (1921) 3 K. B. 93, 100 ;
 G. C. Moses v. Oakeshott (1925)

30 C. W. N. 518, 95 I. C. 522
(26) A. C. 794.

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The Court can only make one of the orders specified above. Further, it can only make an order of the kind mentioned above. An order granting discharge "subject to the insolvent paying Rs. 140 for six months to the Official Assignee" is not an order covered by any of the above clauses, and it cannot be made (z).

Cls. (b) and (c). Suspension for specified period and suspension until payment of dividend.—The power of suspension given under sec. 38 (2) of the Presidency-towns Insolvency Act is to suspend the discharge for a specified period. Under sec. 39 the Court is given an additional power of suspending the discharge until a dividend of not less than four annas in the rupee has been paid. The Court, however, has no power under sec. 39 to suspend the discharge both for a specified period and until payment of the dividend (a).

Cl. (c). Dividend of not less than four annas.—The Court has no power, on suspending the discharge until payment of a dividend, to fix the amount of the dividend either at less or at more than four annas in the rupee (b). An order for suspension until payment of a dividend to creditors *excepting* a particular class of creditors is not a valid order. Where an order is made suspending the discharge until payment of a dividend, and before payment the insolvent acquires property, *e.g.*, a legacy under his father's will which is more than sufficient to pay the amount, the insolvent, being able to pay four annas in the rupee, is discharged, but the whole legacy vests in the Official Assignee or Receiver. This is because under the Insolvency Acts the insolvent is entitled only to the surplus which remains after payment in full to his creditors, and not what remains after paying the amount which entitles him to his discharge (b1). If this were not so and if a windfall came to the insolvent after the order and before the condition had been fulfilled, the insolvent would be able to get his discharge on the payment of four annas in the rupee and to walk off with a large sum of money in his pocket, whilst his creditors would have lost the money which they had paid either for him or to him (c). An order suspending the discharge until a dividend of four annas in the rupee has been paid ought not to be made unless there is a reasonable prospect that some funds or property will be forthcoming and will be available for payment of the debts of the insolvent (d).

Cl. (d). Requiring insolvent to consent to a decree.—*Prima facie* the Court ought not, as a condition upon which it grants an insolvent his discharge, to make an order requiring him to consent to a decree being passed against him for the balance of the provable debts unless there is a probability that something is likely to be gained from such an order

(z) *G. C. Moses v. Oakeshott* (1925) 30 C. W. N. 518, 95 I. C. 522, ('26) A. C. 794.

(a) *Re Walmsley* (1907) 98 L. T. 55.

(b) *Re Kutner* (1921) 3 K. B. 93.

(b1) P.-t. I. A., s. 76; Prov. I. A., s. 67.

(c) *Re Hawkins* (1892) 1 Q. B. 890, 900, 901. See also P.-t. I. A., s. 76; Prov. I. A., s. 67.

(d) *Re Marley* (1900) 82 L. T. 692.

by reason of such bankrupt becoming possessed of some after-acquired property (e). The decree cannot be executed without the leave of the Court. For the purposes of limitation the right to execute the decree accrues when leave to execute is given (f).

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The Court has power to order judgment to be entered for such part of any of the balance of the debts as in its discretion it may think right in the particular case, and it is not bound to enter judgment for the whole amount of the balance, or even for a sum sufficient to pay four annas in the rupee (g). If the insolvent does not give his consent to the judgment within the time fixed by the Rules, the Court may, on the application of the Official Assignee, revoke the order or make such other order as the Court may think fit (h). If the insolvent refuses to consent and the Official Assignee applies under the Rules to have the order revoked, it is not competent for the Court, by repeating its former order, to suspend the discharge until the insolvent consents. But when the order is revoked, the Court is not bound, as the only alternative, to make an order suspending the discharge of the insolvent; it may make such other order as it thinks fit (i). If the insolvent consents to the judgment, but fails to pay the instalments directed by the judgment, the Court may under sec. 8 (1) of the Presidency-towns Insolvency Act revoke the order of discharge (j).

402. Restrictions on powers of Court under Provincial Insolvency Act, sec. 42 (1).—There is no case under the Provincial Insolvency Act in which the Court is *bound* absolutely to refuse an order of discharge as it is under the Presidency-towns Insolvency Act, though the Court may in the exercise of its discretion refuse such an order under s. 41 (2) (a) of the Act (k). The only limitation on the discretion of the Court under the Provincial Insolvency Act is that contained in sec. 42 (1), namely, that the Court must on proof of any of the facts hereinafter mentioned (para. 403) refuse to grant an absolute that is, an immediate unconditional, order of discharge. With this limitation the Court retains the discretion conferred upon it by sec. 41 (2); but that discretion is as to the choice of one of the remaining orders mentioned in sec. 41 (2), and no more. The Court may on proof of any of those facts act in any of the following ways, namely:—

(1) refuse an absolute order of discharge [which includes the power to refuse the discharge absolutely]; or

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| <p>(e) <i>Re Bullen</i> (1888) 5 Morr. 243, 36 W. R. 83; <i>Re Gould</i> (1890) 7 Morr. 215, 63 L. T. 292; <i>Re Shackleton</i> (1889) 6 Morr. 304, 61 L. T. 648.</p> <p>(f) <i>Navivahoo v. Turner</i> (1889) 16 I. A. 156, 13 Bom. 520.</p> <p>(g) <i>Re Richards</i> (1893) 10 Morr. 136.</p> <p>(h) See Calcutta Rule 136 (2), Madras Rule 75 (2), Bombay Rule 129 (2), Rangoon Rule 174 (2).</p> | <p>(i) <i>Re Gaskell</i> (1904) 2 K. B. 478.</p> <p>(j) <i>Re Summers</i> (1907) 2 K. B. 166.</p> <p>(k) See the order made by the County Court Judge in <i>Re Sultzberger</i> (1887) 4 Morr. 82, and the judgment of Cave, J.; <i>Gopalan v. Gopalan</i> (25) A. M. 915, 91 I. C. 31; <i>Mulchand v. Official Receiver</i> (1930) 28 All. L. J. 316 [the head-note is wrong].</p> |
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- (2) suspend the discharge for a specified period (l) ; or
- (3) grant an order of discharge subject to conditions as to payments out of the future earnings or property of the insolvent ; or
- (4) suspend the discharge for a *specified* period under head (2) and at the same time attach conditions to it under head (3). It cannot, however, in the exercise of this power make an order that the insolvent shall remain an insolvent until payment of a dividend of so many annas in the rupee, for the discharge would then be suspended not for a specified period, but until payment, that is, for an indefinite period (m).

The Court can on proof of any of the facts specified in para. 403 below act only in one of the four ways mentioned above. It cannot make any other order.

403. Facts which prevent immediate unconditional discharge [P.-t. I. A., s. 39 (1); Prov. I. A., s. 42 (1)].—The facts hereinbefore referred to, the proof of which prevents the Court from making an absolute order of discharge to take effect immediately, are set forth in sec. 39 (2) of the Presidency-towns Insolvency Act and sec. 42 (1) of the Provincial Insolvency Act. Each of these facts, if proved, constitutes what is called a “minor offence” under the insolvency law, as distinguished from a “major offence” which is punishable with imprisonment (n). These facts are—

(a) *Where the assets are not of the requisite value.*—That the insolvent's assets are not, under the Presidency-towns Insolvency Act, of a value equal to four annas in the rupee, and under the Provincial Insolvency Act, of a value equal to eight annas in the rupee, on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of such value has arisen from circumstances for which he cannot justly be held responsible.

The assets will be deemed to be of the requisite value when the Court is satisfied that the property of the insolvent has realized, or is likely to realize, or with due care in realization might have realized that value (o). The report of the Official Assignee or Receiver is *prima facie* evidence as to whether the assets are or are not of the requisite value (p). Where the report says that the assets are of the requisite value, the burden lies on the opposing creditors to prove the insufficiency of assets (q). Whether the insufficiency was due to the circumstances for which the insolvent could not justly be held responsible is a question to be determined by the Court (r).

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| <p>(l) <i>Devi Dayal v. Sarmukh Singh</i> ('29) A. L. 281, 117 I. C. 662.</p> <p>(m) <i>Ramzan v. Mela Ram</i> ('29) A. L. 461, 117 I. C. 228.</p> <p>(n) P.-t. I. A., ss. 102-103; Prov. I. A., 69, 72.</p> <p>(o) See B.A., 1914, s. 26 (5).</p> | <p>(p) P.-t. I. A., s. 39 (4); Prov. I. A. s. 42 (4).</p> <p>(q) <i>Re Van Laun</i> (1907) 14 Mans. 281; <i>Santi Lal v. Raj Narain</i> (1929) 119 I. C. 4, ('29) A. A. 858.</p> <p>(r) <i>Dutt v. Blades</i> (1928) 48 Cal. L. J. 550, ('28) A. C. 843.</p> |
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Where the assets are of the requisite value, then, so far as this particular offence is concerned, the insolvent is free, and if he has committed no other offence, he can get an immediate unconditional discharge (s). Even if the assets are not of the requisite value, the insolvent is entitled to such discharge if the insufficiency of assets arose through no fault of his and no other offence has been committed by him (t).

(b) *Omission to keep proper books.*—That the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within three years immediately preceding his insolvency.

Omission to keep proper books of account is a serious offence in insolvency (u). The object of requiring the insolvent to keep books is that the Court may be enabled to see, and also the creditors may be enabled to see, in case of insolvency, what his transactions have been and to acquire that knowledge of them without a prolonged and expensive examination by accountants. Another object is to force upon the insolvent trader the contemplation of his own position, and to deprive him of being able to make the excuse, "True, I carried on my business after I ceased to be solvent but in fact I was not aware that that was so" (v). The books must be kept in such a way as to show at once, without the necessity of a prolonged investigation by a skilled accountant, the state of the insolvent's business (w). No books need be kept where it is not usual to keep books in the particular business carried on. The expression "financial position" does not mean the man's financial position *aliunde* but his financial position with regard to the business which is carried on by him (x). If a transaction is an isolated transaction not intended to be repeated, it will not amount to carrying on a business, which expression in general involves transactions from time to time. If, however, a transaction, which is a first transaction, is one which if repeated would be a transaction in a business, and if it is proved that such first transaction was undertaken with the intent that it should be the first of several transactions, and with the intent of carrying on the business of which it is a transaction, then the first transaction proved to have been put through with that intent will be a transaction in an existing business; and if it is the first transaction in a business in which it is proper to keep books, proper books must be kept from the moment of the beginning of the first transaction (y). An insolvent who has by his conduct in not keeping proper books shown incapacity to carry on a business should as a rule be refused his discharge with liberty to apply again at a future period if he can show that he has since acquired the knowledge in which he was before deficient (z).

- (s) *Re Kutner* (1921) 3 K. B. 93, 98; *Nand Lal Mukerjee v. Girdhari Lal* (1928) 109 I.C. 633, ('28) A. O. 263. In *Re Kutner* there were other offences alleged against the bankrupt, and the case was therefore remitted to the Registrar to make such order as he thought fit.
- (t) *Suraj Pal Singh v. Shib Lal* (1929) 119 I. C. 16, (29) A. A. 843; *Suraj Pal v. Shib Lal* (1930) 28 All. L. J. 384.
- (u) *Ex parte Campbell* (1885), 15 Q. B.

- D. 213, 217. See also *Gangaprasad v. Madhuri Saran* (1927) 25 All. L. J. 331, 100 I.C. 550, ('27) A. A. 352.
- (v) *Re Heap* (1887) 4 Morr. 314.
- (w) *Ex parte Reed and Bowen* (1886) 17 Q. B. D. 244.
- (x) *Re Mutton* (1887) 19 Q. B. D. 102.
- (y) *Re Griffin* (1891) 8 Morr. 1, 60 L. J. Q. B. 235.
- (z) *Re Freeman* (1890) 7 Morr. 38, 48, 62 L. T. 367.

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(c) *Continuing to trade after knowledge of insolvency.*—That the insolvent has continued to trade after knowing himself to be insolvent.

"A man, of course, has a perfect right as long as he is solvent, to determine that he will go on with a business, although it may be a losing business. He may trust that before he becomes insolvent matters will change, and he will again be in a condition of prosperity. But the moment he becomes insolvent, [that is, unable to pay his debts in the ordinary course], then he is no longer going on at his own risk in case of failure; he is going on at the risk of his creditors, in case things do not mend as he hopes they will. In my judgment a man has no right to do that. The moment things have got to such a pitch that he cannot pay 20s. in the pound, but he nevertheless thinks that if he goes on he may be able to retrieve his position, in my opinion he ought to call his creditors together, and leave them who will have to bear the loss in case his calculations are wrong to determine whether that course of going shall be proceeded with or not" (a).

(d) *Contracting debts without reasonable expectation to pay.*—That the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it.

It is the contracting of *debts* which is made an offence, and not the obtaining of goods. Where the debtor obtains goods, even though he is insolvent at the time, he is not within this clause (b); nor is he within it if he contracts debts when he has capital though he knows that the capital is not immediately realizable (c). The debt must have been contracted without reasonable ground of expectation at the time when it is contracted that he would be able to pay it (d). The words "without having any reasonable ground of expectation that he would be able to pay it" point, not at the case of a man who incurs a debt knowing that he cannot pay his debts *generally*, but of a man who incurs a debt knowing that he cannot repay *that debt* (e). The clause covers not only a new and original debt, but also a debt in renewal of or in substitution for a previously existing debt (f). In a Calcutta case it was observed that the period for which the discharge should be suspended as the punishment for misconduct in incurring debts beyond his means is not to be measured by the amount of his debts (g), but this observation was made with reference to the facts of the particular case, and it is not of universal application.

- (a) *Re Stainton* (1887) 4 Morr. 242, 251, 19 Q. B. D. 182.
- (b) *Ex parte Bayley* (1867) L. R. 3 Ch. App. 244.
- (c) *Re Sharp* (1893) 10 Morr. 114.
- (d) *Ex parte Mortimore* (1861) 30 L. J. Bank. 17, 19, 20.

- (e) *In the matter of the Petition of D. Cowie* (1881) 6 Cal. 70, 77.
- (f) *Re Boulton Bros. & Co.* (1927) 1 Ch. 79.
- (g) *Sitaram v. Redden* (1926) 91 L. C. 760, ('26) A. C. 529.

(e) *Not accounting for loss of assets.*—That the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities. Para. 403

The fact that shortly before the insolvency there has been a very large loss or disappearance of assets which the insolvent has failed to account for satisfactorily is a matter which is to be taken into consideration on an application for discharge (h).

(f) *Rash and hazardous speculations, extravagance, etc.*—That the insolvent has brought on or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living or by gambling, or by culpable neglect of his business affairs.

The words used in sec. 42 (1) of the Provincial Insolvency Act are “rash and hazardous.” The words used in the Presidency-towns Insolvency Bill as introduced were “rash and hazardous.” It does not appear that any one suggested in the Select Committee that the word “and” in the Bill should be changed into “or.” The word “or” was not printed in italics in the Bill as reprinted by the Select Committee as it would have been if it were a deliberate change and it would therefore appear that the change was the result of a printer's error.

Judges have always refrained from any attempt to define the word “speculation.” General principles, however, have been laid down which may be regarded as guides. If a man advances money on that which may succeed or may not, it must be a speculation. When it is a mere chance whether the thing succeeds or not, it is hazardous speculation. The question, however, must be considered with respect to the person who enters into the speculation, for what may be hazardous to one man may not be so hazardous to another. If a man possesses a large fortune, a certain scheme may not be so hazardous to him as it would be to another man. The word “rash” applies to the conduct of the insolvent alone, according to his condition and the circumstances and facts of the particular case. Rash and hazardous speculation means such as no reasonably careful man having regard to all the circumstances of the case would enter into (i). A solicitor in practice who undertakes another business involving speculation must be considered “rash” within the meaning of this clause (j). Speculative transactions though connected with a man's business may be gambling transactions within the meaning of this clause, where what is intended is to receive or to pay the difference (k). A creditor who relies on speculations as rash or hazardous must specify them so that the Court may judge (l).

(h) *Re Jones* (1890) 24 Q. B. D. 589, 597.

(i) *Re Keays* (1892) 9 Morr. 18, 22-23; *In the matter of Hormaji Ardeshir Wadia* (1893) 17 Bom. 313.

(j) *Re Keays* (1892) 9 Morr. 18.

(k) *Re Stainton* (1897) 4 Morr. 242, 252, 19 Q. B. D. 182.

(l) *Re John Brown & Co.* (1906) 22 T. L. R. 291.

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As to extravagance in living Cave, J., said in *Re Stainton* (m): "A man is bound not to keep up appearances, but to pay his debts, and if his profits will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his scale of living, and not to go on living out of the money of his creditors."

(g) *Frivolous or vexatious defence*.—That the insolvent has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any suit properly brought against him.

This clause does not occur in the Provincial Insolvency Act.

(h) *Frivolous or vexatious suit*.—That the insolvent has within three months preceding the time of presentation of the petition incurred unjustifiable expense by bringing a frivolous or vexatious suit.

This clause does not occur in the Provincial Insolvency Act.

(i) *Undue preference*.—That the insolvent has within three months preceding the date of the presentation of the petition, when unable to pay his debts as they become due, given an undue preference to any of his creditors.

The numbering of this clause in the two Acts is different owing to the absence from the Provincial Insolvency Act of the last two clauses. It is clause (i) in the Presidency-towns Insolvency Act and clause (g) in the Provincial Insolvency Act.

The expression "undue preference" in this clause must be distinguished from a "fraudulent preference" which constitutes an act of insolvency (n) and which can be set aside by the Official Assignee or Receiver (o) for the benefit of the general body of creditors. A preference may be an undue preference, though not fraudulent (p). It is undue preference if a debtor on the eve of insolvency pays a creditor in full though that creditor would be entitled to a similar preference under the insolvency (q). Dealing with this subject, Lord Esher, M. R., said: "Now, what is the duty of a debtor who is unable to pay his debts as they become due, and is within three months of bankruptcy? In my opinion, it is his duty when on the eve of bankruptcy, not to interfere in any way whatever among his creditors; he knows that, on bankruptcy, whatever property he has will be equally divided among his creditors, and he ought not to do anything to prevent that equal division. If he interferes in any way in order to give any advantage to any one of the creditors over the others, he is guilty of giving undue preference" (r).

(j) *Concealment of property and fraudulent breach of trust*.—That the insolvent has concealed or removed his books or his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust.

(m) (1887) 4 Morr. 242, 251, 19 Q. B. D. 182.

(n) P.-t. I. A., s. 9 (c); Prov. I. A., s. 6 (c).

(o) P.-t. I. A., s. 56; Prov. I. A., s. 54.

(p) *Re Skegg* (1890) 25 Q. B. D. 505.

(q) *Re Bryant* (1895) 1 Q. B. 420.

(r) *Re Skegg* (1890) 25 Q. B. D. 505, 509.

The numbering of this clause in the two Acts is different for the reason stated above. It is clause (j) in the Presidency-towns Insolvency Act, and clause (i) in the Provincial Insolvency Act. The words "his books or" do not occur in the Provincial Act. A transfer of property by the insolvent prior to his insolvency with a view to use it as a shield against his creditors is a removal of property within the meaning of this clause (s). The breach of trust referred to in this clause must be fraudulent. A breach of trust ignorantly committed is not within this clause (t).

(k) *Previous insolvency*.—That the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors.

This clause does not occur in the Presidency-towns Insolvency Act. It was sec. 44 (3) (h) of the Provincial Insolvency Act, 1907, and was taken from the Bankruptcy Act, 1883, sec. 28 (3) (g), now the Bankruptcy Act, 1914, sec. 26 (3) (k).

404. Immediate unconditional discharge.—If any of the facts mentioned in paragraph 403 is proved, the Court cannot under either Act grant an immediate unconditional discharge (u). Under the Presidency-towns Insolvency Act it must make one of the four alternative orders mentioned in paragraph 401 above. Under the Provincial Insolvency Act the Court must make one of the orders mentioned in para. 402 above. But whether the case is one under the Presidency-towns Insolvency Act or under the Provincial Insolvency Act, it is the duty of the Court, where any of those facts are alleged, to find specifically whether they exist (v). Rules made by the High Courts of Bombay and Rangoon provide for forms of orders refusing discharge which, if duly filled up, would show in what respects the insolvent has not complied with the law (w). Even if none of the facts mentioned above is proved, the Court may refuse an immediate unconditional discharge if the debtor's conduct in connection with the insolvency has been such as to require the imposition of some condition (x) [see para. 397 above]. There are cases in which in addition to some of the facts mentioned above there is misconduct on the part of the insolvent, e.g., refusal to assist the Official Assignee or Receiver in the realization of his property. In such a case, the Court will visit the insolvent with a more severe punishment (y).

405. Suspension of discharge.—Suspension of discharge for a limited period is a very common method by which the Court punishes insolvency

(s) *J. C. Moses v. A. C. Oakeshott* (1925) 30 C. W. N. 518, 95. I. C. 522, ('26) A. C. 794.

(t) *Re Freeman* (1890) 7 Morr. 38, 62 L. T. 367; *Re Bottomley* (1893) 10 Morr. 262.

(u) *Re Sultsberger* (1887) 4 Morr. 82, 89-90.

(v) *Re Orwell* (1892) 9 Morr. 202.

(w) Bombay Rule 130 and Form No. 34; Rangoon Rule 171 and Form No. 103.

(x) *Re Barker* (1890) 25 Q. B. D. 285; *Re Kutner* (1921) 3 K. B. 93, 102.

(y) See *Jagmohan Singh v. Deputy Commissioner, Fyzabad* (1925) 80 I. C. 54, ('25) A. O. 112.

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offences. The Court has an absolute discretion as to the period of suspension. Each case depends on its own facts, and no hard and fast rule can be laid down. The discharge may be suspended for a day or it may be suspended for as much as five years. In an English case where the only offence committed by the bankrupt was that twenty-three years prior to his bankruptcy he had made a statutory arrangement with his creditors (z), the discharge was nominally suspended for one day (a). Such cases, however, are very rare. Suspension for a long period such as five years is a severe punishment and it should be reserved for very bad cases (b). Suspension of discharge for three months or six months is too mild a punishment, and although it cannot be said that there are no cases in which a suspension for those periods cannot be justifiable, it is the duty of the Court to take a sufficiently serious view of the offences which bankrupts from time to time commit, and to show by the punishment awarded that such offences cannot be committed with impunity (c). Where the case is not of an aggravated nature, an excessive penalty is generally improper especially where the bankrupt is not a trader (d).

An order suspending the discharge of an insolvent for a specified period operates of itself as an absolute order of discharge after the expiry of that period. The Court has no power to attach to such an order a condition requiring the insolvent after the expiration of the specified period to apply again for a final and absolute order of discharge (e).

406. Discharge subject to conditions.—The power given to the Court on application by an insolvent for discharge of imposing a condition to make future money payments ought not to be exercised in such a manner as to make such a condition tantamount to one of absolute refusal of discharge (f). Unless the Court finds a man in receipt of an income derived from his earnings or otherwise which is more than sufficient to keep his family in the enjoyment of the ordinary necessities of life according to their station, or unless it is satisfied that he is likely to succeed to property, it is not a wise thing to grant an order subject to a condition affecting after-acquired property. The Court ought to be careful to see that it does not by such a condition do away with the motive which a man has for exertion to work in his calling, which is a good thing for the public interest generally (g). Where there is no fair reason to suppose that the insolvent will come into possession of money which would enable him to make future payments, the proper course for the Court to take is to estimate at once the punishment which the bankrupt

(z) *B. A.*, 1883, s. 28 (3) (g); *B. A.*, (1914), s. 28 (3) (k); *Prov. I. A.* s. 42 (1) (h).

(a) *Re Sultzberger* (1887) 4 *Morr.* 82.

(b) *Re Swabey* (1897) 76 *L. T.* 534.

(c) *Re Freeman* (1890) 7 *Morr.* 38, 62 *L. T.* 367.

(d) *Re Rankin* (1888) 5 *Morr.* 23.

(e) *Muradally Shamji v. B. N. Lang* (1920) 44 *Bom.* 555, 53 *I.C.* 627.

(f) *Re James* (1891) 8 *Morr.* 19.

(g) *Re Shackleton* (1889) 6 *Morr.* 304, 61 *L. T.* 643; *Re Bullen* (1888) 5 *Morr.* 243; *Re Gould* (1890) 7 *Morr.* 215, 63 *L. T.* 292.

ought to undergo and to suspend the discharge ; or if the Court is of opinion that the insolvent is not entitled to any order of discharge at all, it ought at once to refuse the order and not grant it upon a condition with which there is no probability that the bankrupt will ever be able to comply (h).

An order of discharge is none the less a discharge because conditions are attached to it. An order of discharge subject to conditions releases the insolvent from all debts provable in insolvency as much as an absolute order of discharge.

407. Refusal of discharge with liberty to apply.—Where upon the hearing of an application for discharge the Judge is of opinion that the applicant is not entitled to an immediate unconditional discharge, and also feels himself unable to fix a period of suspension, he may in refusing to grant a discharge reserve liberty to the insolvent to apply again, and if he does so the insolvent may apply again in pursuance of the leave reserved as a matter of right. There is no such right to apply again where the discharge has been refused *absolutely* (i).

408. Renewal of application for discharge : Review [P.-t. I. A., s. 42 (1)].—Under the English law where the discharge of a bankrupt has been refused *absolutely*, the bankrupt is not entitled to apply to the Court *de novo* for an order of discharge, but the Court has power under sec. 108 (1) of the Bankruptcy Act, 1914, to entertain an application by the bankrupt for a review, and may thereupon rescind or vary its former order if it thinks right to do so (j). Sec. 8 (1) of the Presidency-towns Insolvency Act corresponds to sec. 108 (1) of the English Act of 1914, and the Court has power under sec. 8 (1) to review, rescind or vary any order made by it. In addition to this, sec. 42 (1) of the Presidency-towns Insolvency Act contains an express provision that where the discharge is refused, the Court may, after such time and in such circumstances as may be prescribed by the Rules, permit the insolvent to *renew* his application. The principle underlying sec. 42 (1) is the same as that on which the Court of Bankruptcy in England allows a review. It is that where the refusal of the discharge operates as a punishment on the bankrupt, there can be no reason why the punishment should not be remitted at any distance of time, if it can be shown that the object of the punishment has been effected. No one can be affected by the modification or rescission of such an order except the bankrupt himself, and to some extent society at large, which is benefited by the infliction of a punishment only in proportion to its justice and necessity, and is therefore injured and not benefited by the continuance of a punishment after the necessity for it has ceased (k). In reviewing its order the Bankruptcy Court in England takes into consideration the subsequent conduct of the bankrupt (l). Rules have

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(h) *Re James* (1891) 8 Morr. 19.

(i) *Re Tobias & Co.* (1891) 1 Q. B. 463, 464; *Re James* (1891) 8 Morr. 19.

(j) *Re Tobias & Co.* (1891) 1 Q. B. 463.

(k) *Re Tobias & Co.* (1891) 1 Q.B. 463, 465-466.

(l) *Re Shields* (1912) 106 L. T. 345.

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been framed by almost all the High Courts prescribing the period after which the Court may permit the insolvent to renew his application for discharge. The period prescribed by the Bombay and Rangoon Rules is two years from the date of the order of refusal, and that prescribed by the Madras Rules is one year. Under the Rangoon Rules permission may be given on sufficient grounds being shown such as subsequent good conduct of the insolvent, and on production of a certificate from the Official Assignee that the insolvent has furnished and rendered so far as he could such information and assistance as were required of him (m).

There is no provision for a review in the Provincial Insolvency Act, but the power of review is conferred by sec. 5 of the Act read with O. 47 of the Code of Civil Procedure. That power, however, can only be exercised within the limits prescribed by O. 47, r. 1, of the Code (n) as explained by the Judicial Committee in *Chhaju Ram v. Neki* (o). Nor is there any provision in the Provincial Insolvency Act enabling the insolvent to renew his application with the permission of the Court such as that contained in the Presidency-towns Insolvency Act. It would seem to follow that the Court has no power under the Provincial Insolvency Act to permit the insolvent to renew his application, with the result that if once the discharge is refused absolutely, the insolvent is for ever debarred from obtaining his discharge. In Sind it has been held that the Court has no power to permit the insolvent to renew the application (p). On the other hand, a Full Bench of the Madras High Court has expressed the opinion that there is nothing in the Act to warrant the suggestion that an application for discharge where refused is refused for ever and that no later application can be made or no renewal of the former application (q). In a Rangoon case it was said that there was nothing in the Provincial Insolvency Act to prevent the insolvent renewing his application "in case fresh circumstances might justify him in doing so" (r). In Allahabad there is a conflict of opinions on this question (r1). The doubt may be cleared up by legislation.

409. Variation of terms of order [P.t. I. A., s. 42 (2)].—Where an order of discharge is made subject to conditions and at any time after the expiration of two years from the date of the order the insolvent satisfies the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

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| <p>(m) Rangoon Rule 178; Bombay Rules 139-142; Madras Rule 71.</p> <p>(n) <i>Abbireddi v. Venkatarreddi</i> (1926) 51 Mad. L. J. 60, 61, 94 I. C. 351, ('27) A. M. 175.</p> <p>(o) (1922) 49 I. A. 144, 3 Lah. 127, 72 I. C. 566, ('22) A. PC. 112.</p> <p>(p) <i>Re Henry Robert Smith</i> (1915) 32 I. C. 575.</p> | <p>(q) <i>Gopalan v. Gopalan</i> ('25) A. M. 915, 91 I. C. 31; <i>Velayudha v. Suberamaniam</i> ('28) A. M. 609, 109 I. C. 636.</p> <p>(r) <i>Tan Seik Ke v. C. A. M. C. T Firm</i> (1928) 6 Rang. 27, 28, 109 I. C. 769, ('28) A. R. 109.</p> <p>(r1) <i>Mul Chand v. Official Receiver</i> (1930) 28 All. L. J. 316.</p> |
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This corresponds to the proviso to sec. 26 (2) of the Bankruptcy Act, 1914. There was no such proviso in the Bankruptcy Act, 1883. The proviso was first introduced by the Bankruptcy Act, 1890. There is no corresponding section in the Provincial Insolvency Act.

An application for the modification of the terms of a conditional order of discharge should be made by the insolvent himself, and not by the Official Assignee. Upon such an application what the Court has to consider is whether there is "no reasonable probability" of the insolvent being able to comply with the terms of the order of discharge. The conditions imposed by the order are intended for the benefit of the creditors, and the Court ought not to leave that out of consideration. Mere failure to comply with the Rules which require the insolvent to give particulars to the Official Assignee of the property acquired by him after his discharge is no bar to an application for the modification of the terms of the order (s). Notice of the hearing of the application should be given by the insolvent to the Official Assignee and creditors (t).

410. Refusal of discharge not a termination of insolvency proceedings.—The refusal of a discharge does not *ipso facto* terminate the insolvency proceedings (u). It is strange that the Courts should have been called upon to lay down this elementary proposition in no less than three cases.

411. Annulment of adjudication on failure to apply for discharge [P.-t. I. A., s. 41; Prov. I. A., s. 43].—Under the Presidency-towns Insolvency Act, if any insolvent does not appear on the day fixed for hearing his application for discharge or if an insolvent does not apply to the Court for an order of discharge within such time as may be prescribed by the Rules, the Court *may* annul the adjudication or make such other order as it may think fit. Under the Provincial Insolvency Act, if the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication *shall* be annulled. This subject has been considered in paragraphs 349 to 355 above.

412. Special case of marriage settlements under Presidency-towns Insolvency Act (s. 44).—In either of the following cases that is to say—

- (1) in the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the

(s) *Re Roberts & Co.* (1904) 2 K.B. 299.

(t) See Calcutta Rule 142, Madras Rule 74, and Bombay Rule 135.

(u) *Tan Seik Ke v. C. A. M. C. T. Firm* (1928) 6 Rang. 27, 109 I.C. 769,

('28) A.R. 109; *Rowe & Co. v. Tan Thean Teik* (1924) 2 Rang. 643, 84 I.C. 909, ('25) A.R. 105, *Alamelu v. Venkatarama Aiyar* (1927) 53 Mad. L.J. 422, 105 I.C. 165, ('27) A. M. 919.

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settlement able to pay all his debts without the aid of the property comprised in the settlement ; or

- (2) in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife) ;

if the settlor is adjudged insolvent or compounds or arranges with his creditors, and it appears to the Court that the settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend an order of discharge or grant an order subject to conditions or refuse to approve a composition or arrangement.

413. Effect of order of discharge [P.-t. I. A., s. 45 ; Prov. I. A., s. 44].—An order of discharge does not release the insolvent from—

- (a) any debt due to the Crown ; or
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party ; or
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party ; or
- (d) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898.

Save as provided above, an order of discharge releases the insolvent from all debts provable in insolvency.

An order of discharge does not release any person who at the date of the presentation of the petition was a partner or co-trustee with the insolvent or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him.

414. Excepted debts.—An order of discharge does not release the insolvent from four kinds of debts or liabilities mentioned in paragraph 413 above. Except as to these debts and liabilities an order of discharge has the effect of releasing the insolvent from all debts and liabilities provable in insolvency.

Crown debts.—In determining whether or not a debt falls under the denomination of a Crown debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State (v). A judgment-debt due to the Secretary of State for India in Council, arising out of transactions at a public sale of opium held by the

(v) *Secretary of State for India v. Bombay Landing and Shipping Co.* (1868) 5 Bom. H.C.O.C. 23 ;

Judah v. Secretary of State for India (1886) 12 Cal. 445.

Secretary of State, is a debt in respect of Crown property, and therefore, a Crown debt (w). Court-fees payable by a person suing *in forma pauperis* constitute a Crown debt (x). It is not outside the scope of the powers of the Government of India to conduct a soap factory for educating the public and encouraging the starting of similar factories by private enterprise; money due by an insolvent for soap supplied to him by the factory is a debt due to the Crown (y). Para. 414

Debts incurred by fraud, etc.—A debt though incurred by fraud or by fraudulent breach of trust is barred by an order of discharge unless the insolvent was a party to it. Thus if one of two partners in a solicitors' firm misappropriates to his own use money received by the firm on behalf of a client and the other is ignorant and innocent of the fraud, and the innocent partner is afterwards adjudged insolvent and obtains his discharge, he will be released from his liability to the client by his discharge, as he was not a party to the fraudulent breach of trust. It was otherwise under the Bankruptcy Act, 1869. Under that Act (z) an order of discharge did not release the bankrupt from any "debt or liability incurred by means of any fraud or breach of trust." It was accordingly held in *Cooper v. Prichard* (a), a case under that Act, that a partner in a solicitors' firm, though he was not a party to a fraudulent breach of trust committed by his co-partner, was not released by his discharge from his liability to the client. It was to meet this decision that the words "fraudulent" and "to which he was a party" were inserted in the Bankruptcy Act, 1883, sec. 30 [now the Bankruptcy Act, 1914, sec. 28] upon which this section is based. The liability of a promoter of a company who has received secret profit from the vendors to make it good to the company is incurred by fraud and also by breach of trust, and he is not released from such liability by his discharge (b).

Liability for maintenance.—An order of discharge does not release the insolvent from any liability under an order for maintenance under sec. 488 of the Code of Criminal Procedure, 1898. Orders therefore for the payment of arrears of maintenance may be made and enforced in spite of the discharge, whether the arrears fell due before or after the discharge. Sec. 488 empowers certain magistrates, where a person having sufficient means neglects or refuses to maintain his wife or such of his children as are unable to maintain themselves, to order such person to make a monthly allowance for their maintenance, and if he fails without sufficient cause (c) to comply with the order, to sentence him to imprisonment. If a person against whom such

(w) *Judah v. Secretary of State for India* (1886) 12 Cal. 445.

(x) *Gayanoda Bala v. Butto Kristo* (1906) 33 Cal. 1040.

(y) *In the matter of Sabramania Chetty & Co.* (1922) 45 Mad. 150, 70 I. C. 764, ('22) A.M. 243.

(z) B. A., 1869, s. 49.

(a) (1883) 11 Q.B.D. 351.

(b) *Emma Silver Mining Company v. Grant* (1881) 17 Ch. D. 122.

(c) The words "fails without sufficient cause" have been substituted for the words "wilfully neglects" which occurred in the original section.

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an order is made becomes insolvent and obtains a protection order, he will not be protected from arrest or imprisonment, for a protection order extends only to debts provable in insolvency. It does not follow, however, that he will be condemned to imprisonment under sec. 488 if he commits default in payment. It is open to him to show that he is unable to pay the amount, and he may rely on the order of adjudication to prove his inability. In a Calcutta case where a person against whom such an order was made was adjudged insolvent on his own petition it was held that the order of adjudication was *conclusive* proof of his inability to pay, and that he could not therefore be sentenced to imprisonment (d). This, it is submitted, is an extreme view.

415. Provable debts and discharge.—With the exceptions mentioned above, an order of discharge, whether absolute or made subject to conditions, releases the debtor from all debts provable in insolvency (e). Those debts are completely wiped out by the discharge of the insolvent, and a creditor who has not proved his debt will have no remedy against either the person of the insolvent or property acquired by him after his discharge in respect of such debt even if his name was omitted by the insolvent from the schedule of creditors and he knew nothing of the insolvency (f). The same rule applies to a judgment-creditor who too will be precluded from executing his decree (g). The right of proof, however, is not determined by an order of discharge. A creditor, though he has not proved before discharge, is entitled to come in and prove at any time so long as there are assets available for distribution provided that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose (h).

416. Debts not provable and discharge.—Debts or liabilities which are not provable in insolvency are not affected by the discharge of the insolvent. Debts incurred by fraud, in so far as they are the subject of actions of tort, are not provable in insolvency, and are not therefore affected by an order of discharge. A suit founded on such a fraud may be brought even before discharge (i), and no leave of the Insolvency Court is necessary. But the property of the insolvent having vested in the Official Assignee or Receiver, execution cannot be issued until after discharge (j). The same principle applies to actions for unliquidated damages in tort, such damages not being a liability provable in insolvency.

417. Order of discharge and surety.—An order of discharge obtained by the principal debtor does not discharge the surety. If the surety

(d) *Halfhide v. Halfhide* (1923) 50 Cal. 867, 81 I. C. 912, ('24) A. C. 230.

(e) As to what debts are provable, see P.-t. I. A., s. 46, and Prov. I. A., s. 34.

(f) *Elmslie v. Corrie* (1878) 4 Q.B.D. 295.

(g) *Ramrao v. Wasudeo* ('28) A. N. 336, 110 I. C. 893.

(h) *Re McMurdo* (1902) 2 Ch. 684, 699;

Sivasubramania v. Theethiappa (1924) 47 Mad. 120, 75 I. C. 572, ('24) A.M. 163; *Re Ramchandra Ganuji Waikar* (1927) 29 Bom. L. R. 1167. See also P.-t. I. A., s. 72; Prov. I. A., s. 63.

(i) *Ex parte Coker* (1875) L.R. 10 Ch. App. 652.

(j) *Cobham v. Dalton* (1875) L. R. 10 Ch. App. 655.

pays the creditor, he cannot sue the debtor after he has obtained his discharge, but he is entitled to prove for the amount paid (*k*).

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418. Promise to pay a debt barred by discharge.—A debt which is barred by a discharge cannot be revived by a subsequent promise to pay (*l*). But a promise by the insolvent for a fresh consideration to pay such a debt is binding on him, and an action will lie for the debt (*m*).

419. Property acquired by insolvent after discharge.—Subject to any conditions which may be attached to an order of discharge under secs. 38 and 39 of the Presidency-towns Insolvency Act and sec. 41 of the Provincial Insolvency Act, property acquired by the insolvent after his discharge belongs solely to him (*n*). Where a man is in receipt of income at the time of his insolvency, such income does not after his discharge continue to be vested in the Official Assignee; and apart from any order of the Court directing the insolvent to pay over a portion of his income notwithstanding his discharge the income does not vest in the Official Assignee in any way (*o*).

A secured creditor whose debt is secured by a mortgage of existing property is not affected by an order of discharge (*p*). An assignment, however, of *after-acquired* chattels stands on a different footing. If the insolvent has before adjudication assigned chattels to be acquired by him in future as security for a debt, the creditor has no right to chattels acquired by the insolvent after his discharge, for the debt being gone, the collateral security falls with it (*q*).

Rules made by some of the High Courts under the Presidency-towns Insolvency Act provide that where the insolvent is discharged subject to the condition that judgment shall be entered against him or subject to any other condition as to his future earnings or after-acquired property, it is his duty, until such judgment or condition is satisfied, from time to time to give to the Official Assignee such information as he may require with respect to his earnings and after-acquired property and income, and not less than once a year to file in the Court a statement showing the particulars of any property or income he may have acquired subsequent to his discharge (*r*).

420. Order of discharge conclusive evidence of insolvency.—Under the Presidency-towns Insolvency Act an order of discharge is conclusive evidence of the insolvency and of the validity of the proceedings therein (*s*). There is no such provision in the Provincial Insolvency Act; but the order would be conclusive evidence of the fact of discharge under sec. 41 of the Indian Evidence Act, 1872, subject to the provisions of sec. 44 of that Act.

(*k*) *Gangadhar v. Kanhai* (1928) 50 All. 606, 109 I. C. 421, ('28) A.A. 306.

(*l*) *Heather v. Webb* (1876) 2 C.P.D. 1.

(*m*) *Jakeman v. Cook* (1878) 4 Ex. D. 26.

(*n*) If the order of discharge is revoked, the after-acquired property will vest in the Official Assignee.

(*o*) *Re Gold* (1891) 8 Morr. 45.

(*p*) *Shridhar Narayan v. Atmaram*

Govind (1883) 7 Bom. 455.

(*q*) *Cole v. Kernot* (1872) L.R. 7 Q. B. 534; *Thomson v. Cohen* (1872) L. R. 7 Q. B. 527; *Collyer v. Isaacs* (1881) 19 Ch. D. 342.

(*r*) See Bombay Rule 133, Calcutta Rule 140, Madras Rule 77, Rangoon Rule 176.

(*s*) P.-t. I. A., s. 45 (3).

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421. Criminal liability.—An order of discharge does not exempt the insolvent from being proceeded against for any criminal offence, whether connected with insolvency (t) or not.

422. Effect of Indian and foreign orders of discharge.—It has been held in England that the discharge from any debt under a Bankruptcy Act of the Imperial Parliament is a complete bar, in any country forming part of the British Dominions, to a debt contracted in any part of the world (u). It has also been held that a discharge from any debt under the bankruptcy law of the country where the debt has been contracted is a discharge from that debt in England (v), but not if such debt has neither been contracted nor is to be paid in that country (w). It has thus been held in Madras that the discharge from a debt under the bankruptcy law of Ceylon where the debt was contracted is a discharge from that debt in a British Indian Court (x). Where a discharge in a foreign bankruptcy is relied upon, it must be shown that an order of discharge in that country releases the debtor from all debts and liabilities provable under the bankruptcy (y).

The Indian Insolvency Act, 1848, was an Act of the Imperial Parliament and a discharge from any debt under that Act was a discharge from such debt in any country forming part of the British Dominions (z). The Presidency-towns Insolvency Act, however, is an Act of the Indian legislature, and a discharge under that Act can have no such operation. In a Bombay case *Macleod, C.J.*, said that an order of discharge granted by a Court exercising jurisdiction under the Presidency-towns Insolvency Act "would no doubt be recognised by all the Courts of the British Empire" (a). This, however, can only be upon the principles of international law mentioned above. In that case the debtor was adjudged insolvent in Bombay, and he obtained his discharge from the Bombay Court. After his discharge one of his creditors who had obtained a decree against the insolvent in the Court of the Sirohi State threatened to execute the decree by attaching the insolvent's property in that State. The insolvent applied to the Bombay Court for an injunction restraining the decree-holder from executing the decree. The State had refused to recognise the Official Assignee. It was held that if the insolvent had property in that State there was no reason why the decree-holder should not be allowed to attach it, and the application was refused (b).

423. Discharge of insolvent not a termination of insolvency proceedings.—It is obvious that the discharge of the insolvent does not

(t) P. t. I. A., s. 105; Prov. I. A., s. 71.

(u) *Ellis v. McHenry* (1871) L. R. 6 C. P. 228; *Armani v. Castrique* (1844) 13 M. & W. 443, 447, 153 E.R. 185, 186.

(v) *Potter v. Brown* (1804) 5 East 124, 102 E.R. 1016.

(w) *Gibbs v. Société Industrielle* (1890) 25 Q.B.D. 399; *Bartley v. Hodges* (1861) 30 L. J. Q. B. 352.

(x) *Maguda v. Muhammadhu* (1911) 51 I. C. 38.

(y) *Rangaswamy v. Narayanaswami*

(1914) 34 Mad. 247, 7 I.C. 417.

(z) In order that an order of discharge under the I. I. A., 1848, could have operation outside British India it was necessary that notice of the order *nisi* should have been published in the London Gazette: see I.I.A., 1848, s. 60.

(a) *Lakshmiram Kevalram v. Poonamchand Pitamber* (1921) 45 Bom. 550, 59 I. C. 444, ('21) A.B. 128.

(b) (1921) 45 Bom. 550, 59 I.C. 444, ('21) A. B. 128, *supra*.

put an end to the Court's power to give directions as to the distribution of assets amongst the creditors. Notwithstanding the discharge the Official Assignee or Receiver is entitled to realise the assets which belonged to the insolvent at the commencement of the insolvency and which the insolvent acquired prior to his discharge (c).

424. Duties of insolvent after discharge under Presidency-towns Insolvency Act (s. 43).—Under the Presidency-towns Insolvency Act, a discharged insolvent must, notwithstanding his discharge, give such assistance as the Official Assignee may require in the realization and distribution of such of his property as is vested in the Official Assignee, and, if he fails to do so, he will be guilty of a contempt of Court; and the Court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition or payment duly made or thing duly done subsequent to the discharge, but before its revocation.

If the order of discharge is revoked the result would be the same as if there had been no discharge and the debtor had continued insolvent throughout; but sales and other dispositions of property made by the insolvent subsequent to the discharge would remain valid. There is no corresponding section in the Provincial Insolvency Act.

425. Revocation of order of discharge under Presidency-towns Insolvency Act.—There are, it seems, three cases in which an order of discharge may be revoked under the Presidency-towns Insolvency Act, namely,—

- (1) where the insolvent fails to assist the Official Assignee in the realization and distribution of his property under sec. 43 of the Presidency-towns Insolvency Act;
- (2) where the insolvent fails to file statements showing particulars of his after-acquired property in cases in which he is bound to do so under the Rules (d). See para. 419, "Property acquired by insolvent after discharge";
- (3) where an order of discharge is made conditional upon the insolvent consenting to a judgment being entered up against him in favour of the Official Assignee, and he fails to give his consent within the time prescribed by the Rules (e). See para. 401 under head "Cl. (d)."

426. Insolvency Rules as to discharge.—As to Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 132-142C, Madras Rules 70-78, Bombay Rules 125-142, and Rangoon Rules 164-178. As to Rules under the Provincial Insolvency Act, see Calcutta Rule 9, Madras Rules XX and XXI, Bombay Rules XXIII and XXIV, and Allahabad Rule 9.

(c) *K. P. S. P. P. L. Firm v. C. A. P. C. Firm* (1929) 7 Rang. 126, ("29) A. R. 168.

(d) See Calcutta Rule 141, Madras Rule 78, Bombay Rule 134, Rangoon

Rule 176 (2).

(e) See Calcutta Rule 136, Madras Rule 75, Bombay Rule 129, Rangoon Rule 174.

LECTURE VII.

PART III.

PROOF OF DEBTS.

1. *Debts provable and not provable.*[*P.-t. I. A.*, s. 46; *Prov. I. A.*, s. 34.]Paras.
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427. **Effect of insolvency on rights of creditors.**—When a person is adjudged insolvent, his property is transferred to the Official Assignee or Receiver, and the remedies which his creditors had against his property are taken away before he was adjudged insolvent. In substitution for those remedies the creditors acquire a right to share equally and proportionately in the distribution of the insolvent's assets (a). A creditor who wishes to share in the distribution must prove for his debt in the mode prescribed by the Acts. Besides debts in the usual sense of the word there are "liabilities" in respect of which a creditor may prove. The debts and liabilities, however, must be such as are provable in insolvency. Debts and liabilities in respect of which creditors are entitled to share in the distribution of the assets are called "debts provable in insolvency," and the method by which the debts and liabilities are established is called "proof of debts." A creditor who fails to prove for a debt or liability which is provable in insolvency cannot, after the discharge of the insolvent, sue him for it. The debt is barred by the discharge. Debts and liabilities not provable in insolvency are unaffected by an order of discharge.

428. **Earlier bankruptcy laws.**—Prior to the Bankruptcy Act, 1849, the only debts that were provable in bankruptcy were debts which were certain or absolute. Contingent debts were not provable unless the debt had become absolute by the happening of the contingency before the act of bankruptcy on which the commission issued. Contingent debts were made provable for the first time by the Bankruptcy Act, 1849, but to a very limited extent. The class of provable debts was from time to time enlarged, and has since the Bankruptcy Act, 1869, embraced almost, if not quite, all contractual liabilities imaginable (b). Referring to the Act of 1869, Sir W. M. James, L.J., said (c): "A great number of cases occurred, before the passing of the late Act [*i.e.*, the Bankruptcy Act, 1869], in which the bankrupt was left liable to several claims of various kinds, and the persons who had those claims were entirely excluded from any participation in the general division of the assets. Then came the Act of Parliament, which dealing in express terms with almost every one of the cases which had ever previously occurred, and excluding nothing but demands for damages for personal torts, provided that there should be nothing whatever for which

(a) *Re Thomas* (1888) 21 Q.B.D. 380, 383.(b) *Re Browne and Wingrove* (1891) 2 Q.B. 574, 578.(c) *Ex parte Llynvi Coal and Iron Company* (1871) L.R. 7 Ch. App. 28, 31.

a right to proof should not be given. Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy, and to be ascertained either by the court itself, or with the aid of a jury. The broad purview of this Act is, that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements and contingencies of every kind. On the other hand all the persons from whose claims, and from liability to whom he is so freed are to come in with the other creditors and share in the distribution of the assets."

It may here be observed that questions as to proof of debts in an insolvency under the Indian Insolvency Act, 1848, pending when the Presidency-towns Insolvency Act came into force are to be decided by the English Bankruptcy law as it may be from time to time (c1).

429. Debts and liabilities not provable in insolvency.—There are three classes of debts or liabilities which are not provable in insolvency, namely:—

- (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust.
- (2) Debts or liabilities contracted by the debtor with any person, after that person has had notice of the presentation of any insolvency petition by or against the debtor. This clause does not occur in the Provincial Insolvency Act. The effect is that a debt or liability falling within this clause is provable under that Act.
- (3) Contingent debts and liabilities, the value of which cannot, in the opinion of the Court, be fairly estimated.

430. (1) Unliquidated damages not arising out of contract or breach of trust: Damages for tort.—Claims for unliquidated damages cannot be proved for unless they arise out of a contract or breach of trust. Therefore, unliquidated damages for tort cannot be proved for, e.g., for libel or trespass or misrepresentations by a director in a prospectus (d), unless they have been ascertained before the date of the order of adjudication by judgment, award, or compromise (e). Where in a case of unliquidated damages in tort it is possible to waive the tort and to treat the matter as a breach of contract the creditor may waive the tort and prove on the contract (f).

431. (2) Debts contracted after notice of presentation of petition.—Debts incurred after adjudication are never provable in insolvency (g). As regards debts contracted before adjudication, the creditor can prove for them if he had no notice of the presentation of an

(c1) *Kanto Mohan v. Gulstaun* (1930) 51 Cal. L. J. 283.

(d) *Re Giles* (1889) 61 L.T. 82.

(e) *Re Newman* (1874) 3 Ch. D. 494; *Ex parte Harding* (1854) 23 L.J. Bank. 22; *Ex parte Mumford* (1808) 15 Ves. 289, 33 E.R. 763. See C.P.C., 1908, O. 20, r. 3.

(f) *Parker v. Norton* (1796) 6 T.R. 695, 699, 101 E.R. 777, 779. *Ex parte Baum* (1874) L.R. 9 Ch. App. 673. See also *Re Hopkins* (1902) 86 L.T. 676.

(g) *Kesheoram v. Govindram* (1923) 48 I.C. 340, ('23) A.N. 142; *Kallu v. Agha Salim* (1925) 89 I.C. 923, ('25) A.O. 668.

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insolvency petition by or against the debtor, but not if he had such notice. Even where the creditor has notice, the debt itself is not non-provable. It is a provable debt within the meaning of sec. 46 (3), but the creditor having notice of the presentation of the petition, he is under a personal disability to prove. The result is as regards a creditor who has notice of a petition that he cannot *prove* for the debt, nor can he *recover it by action* either before or after the discharge of the debtor. Before discharge the action cannot be commenced without the leave of the Court, and no leave would be granted in such a case (h). After discharge the suit would be barred by sec. 45 of the Presidency-towns Insolvency Act. This clause, as stated above, is not contained in the Provincial Insolvency Act. A creditor therefore who advances money to the debtor before an order of adjudication has been made is entitled to prove under that Act, even if the advance was made after notice of the presentation of the petition. It is difficult to understand why this distinction has been made.

432. (3) Contingent debts incapable of being fairly estimated.

—With regard to contingent debts and liabilities which are provable in insolvency, it is the duty of the Official Assignee under the Presidency-towns Insolvency Act, and of the Court under the Provincial Insolvency Act, to make an estimate of their value. If the value of any such debt or liability is incapable of being fairly estimated, that debt or liability will be deemed to be one not provable in insolvency. The case of *Hardy v. Fothergill* (i) decides that contingent future liability, however difficult it may be to assess, is something which must be taken to be capable of estimation, except where the Court may declare it to be incapable of being fairly estimated.

The rule as to proof of contingent liabilities has been stated to be as follows: "There is no doubt that a contingent claim for unliquidated damages is a provable debt and its amount has to be estimated as at the date of the receiving order. That, however, does not mean that the effect of the receiving order is to accelerate the happening of the contingency, so as to fix the amount of the defendant's claim on the basis of the contingency having happened on the day of the receiving order, which is, in effect, what the plaintiff's contention amounts to, when asking the Court to measure the defendant's claim for damages by the price of the shares on the day of the receiving order. The claim must be stated as on the day of the receiving order: if, when the proof is lodged, the contingency has not happened, the amount of the claim must be estimated as accurately as possible; if the contingency happens before the proof is lodged, that fact is *pro tanto* evidence of the true value of the claim as at the date of the receiving order, and there will, as a rule, be no difficulty in arriving at the amount of the claim; if the contingency happens after the proof is lodged and it appears that the

(h) See *Buckwell v. Norman* (1898) 1 Q.B. 622.

(i) (1888) 13 App. Cas. 351.

amount at which the damages have been estimated is below the true value, the creditor will be allowed to amend his proof or lodge a fresh proof at any time during the continuance of the bankruptcy, but not so as to disturb prior dividends " (j).

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Alimony.—Alimony ordered by a Court to be paid periodically by a husband to his wife is not the subject of proof. The reasons are that the sum payable is not a lump sum, but a payment to be made monthly or weekly; that the sum is payable out of personal earnings, and that which would go to the wife would take nothing from his creditors; and that the payments cannot be valued, because they could be varied from time to time by the Divorce Court according to the means of the husband, and might at any time be put an end to by resumption of cohabitation (k). For the same reasons arrears of alimony whether accrued before (l) or after (m) the order of adjudication are not provable in insolvency.

433. Debts not provable by the general policy of the law.—Besides the three classes of debts mentioned above, there are certain debts which are not provable by the general policy of the law. The test is whether the debt could have been recovered in an action against the insolvent had he continued solvent. If the debt cannot be enforced by action, it is not provable (n).

(1) *Illegal or immoral consideration.*—A debt which is founded on an illegal or immoral consideration cannot be proved (o).

(2) *Gaming debts.*—A debt arising out of a contract by way of wager or gambling is not provable (p), not even if judgment has been obtained in respect of it (q).

(3) *Contracts against the policy of the bankruptcy laws.*—An agreement to pay money to a creditor to induce him not to oppose his discharge is against the policy of the bankruptcy laws (r), and no proof can be made on such an agreement. The same applies to an agreement whereby what is one debt before the debtor's insolvency becomes another and a larger debt in the event of his insolvency (s).

(4) *Secret agreement to give preference to a creditor.*—A creditor who executes a composition deed, upon the face of which he is to be paid *pari passu* with the other creditors, and at the same time secretly stipulates for a preference, is not entitled, upon discovery of the fraud, to prove even

(j) *Ellis & Co.'s Trustee v. Dixon-Johnson* (1924) 1 Ch. 342, 356.

(k) *Linton v. Linton* (1886) 15 Q.B.D. 239.

(l) *Kerr v. Kerr* (1897) 2 Q.B. 439.

(m) *Re Hawkins* (1894) 1 Q.B. 25.

(n) See *Ex parte Bulmer* (1807) 13 Ves. 313, 33 E.R. 311.

(o) See Indian Contract Act, 1872, s. 23.

(p) See Indian Contract Act, 1872, s.

30; *Re Gieve* (1899) 1 Q.B. 794; *Universal Stock Exchange v. Strachan* (1896) A.C. 166.

(q) *Re Lopes* (1889) 6 Morr. 245.

(r) *Kearley v. Thomson* (1890) 24 Q.B. D. 742; *Naoroji N. Thoonthi v. Kazi Sidick Mirza* (1896) 20 Bom. 636.

(s) *Ex parte Pottinger* (1872) 8 Ch. D. 621, 625.

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for his original debt which by the terms of the composition deed he has released. In such a case the release is absolute, but the condition being tainted with illegality, is void (t). The case of fraudulent preference within the meaning of sec. 56 of the Presidency-towns Insolvency Act and of sec. 53 of the Provincial Insolvency Act stands on a different footing. See para. 439 (5) below.

(5) *Agreement in fraud of other creditors*.—A liability arising out of an agreement which is in fraud of the other creditors is not provable. Thus in *Re Myers (u)*, the owner of a business, who had procured A to become surety for the payment of a debt, and for that purpose to join him in making certain promissory notes, upon the eve of his bankruptcy, entered into an agreement with A for the sale to him of his business and stock-in-trade. By the terms of the agreement A, by way of part payment of the purchase money, took over the sole liability upon the notes. Subsequently the vendor was adjudicated bankrupt, and the trustee in bankruptcy obtained a judgment declaring that the agreement and sale were a sham and void. A, who in the meantime had paid the notes, put forward a proof against the debtor's estate for the money so paid as in respect of a consideration which had failed. It was held that although the debtor's estate had had the benefit of the payment, A could not prove for it, as it had been paid in the course of carrying out a transaction devised in fraud of the general body of creditors, and that so much of the fraudulent agreement as was disadvantageous to A and precluded him from having recourse to the debtor as the principal maker of the notes was binding on him, though the part which was advantageous to him did not bind the other creditors.

(6) *Debts barred by limitation*.—A debt which is barred at the commencement of the insolvency is not provable, but if the debt was not barred at the commencement of the insolvency lapse of time will not deprive the creditor of his right of proof (v).

434. Inquiry into consideration for debt.—Just as the Court has power before making an order of adjudication to inquire into the consideration of the petitioning creditor's debt, so it has power to inquire into the consideration for debts for the purposes of proof (see para. 161 above). For this purpose the Insolvency Court may go behind a judgment, and will inquire into the consideration for the debt even if the debt was admitted by the insolvent in his statement of affairs or schedule (w), and even where

(t) *Ex parte Oliver* (1850) 4 De. G. and Sm. 354, 64 E. R. 868; *Ex parte Phillips* (1888) 36 W. R. 567.

(u) (1908) 1 K. B. 941.

(v) *Ex parte Ross* (1827) 2 Gl. and J. 330; *Sivasubramania v Theethiappa* (1924) 47 Mad. 120, 75 I. C. 572, ('24) A. M. 163; *Baranashi Koer v. Bhabhadeb* (1921) 34 Cal. L. J. 167, 66 I. C. 758, ('21) A. C.

456; *Jhan Bahadur Singh v. Bailiff of the District Court of Toungoo* (1927) 5 Rang. 384, 104 I. C. 816, ('27) A. R. 263; *Syed Ijaz Husain v. Lachman Das* (1924) 75 I. C. 790, ('24) A. O. 351; *Damodar Das v. Hamidul Rahman* (1926) 98 I. C. 74, ('26) A. O. 621.

(w) *Ex parte Revell* (1884) 13 Q. B. D. 720.

he has consented to the judgment (x). Similarly the Court may go behind a judgment obtained on a compromise, and refuse to admit a proof founded upon it, if the original claim was not *bona fide*, but was made for purposes of extortion (y). The Court has a right and duty to go behind any accounts stated or covenant or judgment and in the interest of other creditors get to the real character of the transaction and ascertain whether the debt on which proof is founded is a real debt (y1). Where the circumstances are suspicious, the Court may require the claimant to prove the consideration for the judgment, and if he is unable to prove it, the proof will be rejected (z). Where a judgment was obtained against the debtor by default for money lost in betting, it was held that the judgment being for a gambling debt, the proof should be rejected (a); but where, after an action to recover a gaming debt had been dismissed, the creditor wrote to the committee of the debtor's club complaining of his conduct in not paying his debts of honour, and the debtor, in consideration of the letter of complaint being withdrawn, gave the creditor bills in satisfaction of the debt, it was held that the bills were given for a good consideration, and that the creditor could prove for the amount due thereon (b). Though a Hindu father has admitted a debt, his sons who were joint with him are entitled after the father's death to challenge the *bona fides* of the debt (c). The Court, however, will not inquire into the form of the judgment; the power of the Court to go behind a judgment is a power to inquire into the consideration and not into the form of the judgment, and the judgment is conclusive unless the consideration can be questioned (d). See para. 446 (5).

435. Debts and liabilities provable in insolvency.—With the exceptions mentioned in the section and the exception of debts which are not provable by the general policy of the law, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the order of adjudication, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the order of adjudication, are provable in insolvency. The word “debt” is used in its ordinary sense, but the word “liability” has a special significance. The term “liability” includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied agreement or undertaking, whether

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| <p>(x) <i>Ex parte Lennox</i> (1886) 16 Q.B.D. 315.</p> <p>(y) <i>Ex parte Banner</i> (1881) 17 Ch.D. 480.</p> <p>(y1) <i>Re Vaun Loun</i> (1907) 1 K. B. 155, 162-163, affmd. in (1907) 2 K. B. 23, 30; <i>Kanto Mohan v. Galstoun</i>, (1930) 51 Cal. L. J. 283, 294.</p> <p>(z) <i>Ex parte Anderson</i> (1885) 14 Q.B.D. 606.</p> | <p>(a) <i>Re Deerpurst</i> (1891) 8 Morr. 97.</p> <p>(b) <i>Re Browne</i> (1904) 2 K.B. 133. See also <i>Re Campbell</i> (1911) 2 K.B. 992, a case under the Money-lenders Act, 1900.</p> <p>(c) <i>Sreepat Singh v. Ram Sarup</i> ('26) A.C. 982, 92 I. C. 463.</p> <p>(d) <i>Re Beauchamp</i> (1904) 11 Mans. 5, (1904) 1 K. B. 572.</p> |
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the breach does or does not occur, and whether or not the amount payable is liquidated or unliquidated, present or future, certain or dependent on a contingency, and, as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion (e).

436. Damages arising out of contract.—Damages arising out of contract are provable in insolvency, e.g., damages for fraudulent misrepresentation on a sale of goods (f). The whole policy of the Insolvency Acts is completely to discharge the debtor from contractual obligations to pay sums of money, and the only right of any person under a contract with a person who is subsequently adjudged insolvent, whatever the pecuniary claim is, is to come in and prove (g). There are however certain liabilities arising out of contract which have an object other than the payment of money or which can be met by an injunction or a decree for specific performance. It is not clear whether these liabilities are provable in insolvency. In *Hardy v. Fothergill* (h) the Earl of Selborne said: "There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, etc., which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy."

437. Damages arising out of breach of trust.—The liability of a trustee in respect of a breach of trust was always provable in bankruptcy, though it was not specifically mentioned as a debt provable in bankruptcy either in the Bankruptcy Act, 1869, or in the earlier statutes. The liability of a promoter of a company in respect of secret profit is incurred by breach of trust, and is provable in insolvency (i).

438. Contingent liabilities provable in insolvency.—The following are some of the instances of contingent liabilities which are provable in insolvency:—

(1) *Rent and covenants under a lease.*—The liability of the assignee of a lease under a covenant to indemnify the lessee in respect of future breaches of the lessee's covenants is a provable debt. In *Hardy v. Fothergill* (j), a lease for a term of fifty years contained covenants on the part of the

- (e) This is a part of the Explanation to sec. 46 of P.-t. I. A. No such explanation is appended to the corresponding sec. 34 of Prov. I. A., but it will apply equally to cases under that Act.
(f) *Jack v. Kipping* (1882) 9 Q.B.D.

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(g) *Victor v. Victor* (1912) 1 K.B. 247, 251.
(h) (1888) 13 App. Cas. 351, 360.
(i) *Emma Silver Mining Company v. Grant* (1881) 17 Ch. D. 122.
(j) (1888) 13 App. Cas. 351.

lessee to repair and yield up the demised premises in repair at the end of the term. The lessee assigned the lease for the residue of the term and the assignee covenanted to perform all the covenants in the lease and to indemnify the assignor in respect of any breach of the covenants. Eight years before the term expired the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessee was not scheduled in the debtor's statement of affairs, and no notices were sent to him, and he tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant to indemnify. After the term expired the lessor recovered damages against the lessee upon the covenants for repair. The lessee thereupon claimed an indemnity from the assignee in respect of his covenant to indemnify. It was held that the claim of the lessee was barred by the discharge of the assignee. The ground for the decision was that the contingent liability on the covenant to indemnify was a debt provable in the liquidation unless an order of the Court declared it to be a liability incapable of being fairly estimated. In that case Lord Selborne, after referring to the provisions of sec. 31 of the Bankruptcy Act, 1869, and the definition of the term "liability" and the clause providing for estimating the value of contingent liabilities, said: "According to what appears to be the sound interpretation of the whole clause, the legislature intended that question [of estimating the value], in all disputed cases, to be determined in the course of the proceedings in bankruptcy, and not left open for the determination of other Courts after the bankrupt's discharge; and in undisputed cases, or where no claim might be made to prove, all liabilities within the general definition were to be, and to remain, in the category of provable debts." The substance of the above passage from his Lordship's speech amounts to this, that with the exceptions mentioned in the section all liabilities are provable in bankruptcy unless their value is incapable of being fairly estimated.

In *Hardy v. Fothergill* the assignee of the lease had become bankrupt. The same principle applies where the lessee becomes insolvent and the lessor seeks to prove in his insolvency. In such a case if the lease is disclaimed, the lessor can prove, on the principle laid down in *Hardy v. Fothergill*, for the difference between the rent to be paid under the lease and that which it is estimated he can obtain in future (k). The rule in *Hardy v. Fothergill* applies only where there is a disclaimer. It does not apply where the lessor is proving against the estate of his lessee in respect of an *existing* lease. In the case of an existing lease the lessor is entitled to have a claim entered for the full amount of the rent and for future liability in respect of covenants till the end of the term, but he can only prove for the arrears of rent due and the breaches of covenants which have taken place up to the time of proof (l).

(k) *Ex parte Llynvi Coal and Iron Co.* (1871) L. R. 7 Ch. App. 28. | (l) *Re New Oriental Bank Corporation* (1895) 1 Ch. 753.

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(2) *Liability of surety*.—A liability to indemnify a surety is a contingent liability provable in the insolvency of the principal debtor, although the surety has not paid anything to the creditor (m). Thus if A guarantees to C the payment of a debt due from D to C, and D becomes insolvent, A may prove against the estate of D, though he has not paid C (see para. 444). Similarly the liability of an insolvent co-surety to make contribution is a debt provable in his insolvency (n). Thus if A and B jointly and severally guarantee to C the payment of a debt to him from D, and A becomes insolvent, B may prove against the estate of A, though B has not paid C.

(3) *Liability for payment after death*.—A liability under a covenant for the payment of money out of the estate of the covenantor after his death is provable as a debt in the insolvency of the covenantor. Thus if A covenants with B that his executors or administrators shall, within six months after his death, pay to B a sum of money, and A becomes insolvent, the liability is provable in his insolvency. If no proof is made, and A obtains his discharge, B cannot maintain an action against A's executors or administrators to recover the amount after A's death (o).

439. Other liabilities provable in insolvency.—The following are some more instances of liabilities provable in insolvency :—

(1) *Annuities*.—An annuity for life is capable of being fairly estimated and is therefore provable (p). If the annuity is payable to the wife during her life or widowhood, the value of the contingency of re-marriage is capable of being fairly estimated, and proof may be admitted for the value of the future payments as ascertained by an actuary (q). Where a husband by a deed of separation covenanted to pay an annuity to his wife during their joint lives, determinable if she should not lead a chaste life, or if the husband and wife resumed cohabitation, it was held that the value of the annuity was capable of being fairly estimated and was provable in the bankruptcy of the husband (r).

(2) *Costs*.—The costs of a successful plaintiff are provable in the insolvency of the defendant, and the costs of a successful defendant are provable in the insolvency of the plaintiff, even though they have not been taxed, provided the judgment was pronounced and signed before the date of the order of adjudication (s).

- (m) *Re Paine* (1897) 1 Q.B. 122; *Roderiques v. Ramaswami Chettiar* (1917) 40 Mad. 783, 38 I. C. 783; *Gangadhar v. Kanhai* (1928) 50 All. 606, 109 I.C. 421, ('28) A.A. 306.
(n) *Wolmershausen v. Gullick* (1893) 2 Ch. 514.
(o) *Barnett v. King* (1891) 1 Ch. 4.
(p) *Ex parte Naden* (1867) L.R. 9 Ch. App. 670.

- (q) *Ex parte Blakemore* (1877) 5 Ch. D. 372.
(r) *Ex parte Neal* (1880) 14 Ch. D. 579.
(s) See C.P.C., 1908, O. 20, r. 3. As to the English law, see *Ex parte Peacock* (1873) L.R. 8 Ch. App. 682; *Ex parte Ruffle* (1873) L.R. 8 Ch. App. 997, 1001; *Re Newman* (1876) 3 Ch. D. 494; *Re A Debtor* (No. 68 of 1911), (1911) 2 K.B. 652; *Re Black* (1887) 57 L.T. 419.

(3) *Calls on shares*.—The liability in respect of calls in the winding-up of a company is a debt provable in the insolvency of a contributory. If the company fails to prove, and the contributory obtains his discharge, he cannot afterwards be placed on the list of contributories (t).

(4) *Voluntary bonds*.—A debt arising upon a voluntary bond may be proved for equally with debts for valuable consideration, unless steps have been taken by the Official Assignee or Receiver to set it aside as fraudulent against creditors (u).

(5) *Fraudulent preference*.—Where a payment made by the debtor to a creditor is set aside as being a fraudulent preference within the meaning of sec. 56 of the Presidency-towns Insolvency Act or the corresponding sec. 54 of the Provincial Insolvency Act, the creditor is entitled to prove for his debt with the other creditors (v).

(6) *Commission*.—An agent who brings about the relationship of buyer and seller is entitled to commission, though the actual sale is not carried out till after the insolvency of the seller, and he is entitled to prove for such commission (w).

(7) *Arrears under a deed of separation*.—Arrears under a deed of separation are provable in insolvency (x).

(8) *Damages against co-respondent*.—Damages which a co-respondent has been ordered to pay into Court are provable, though they will not support an insolvency petition against him (y).

(9) *Covenant to pay premiums*.—Damages for breach of a covenant to pay premiums entered into by the assured at the time of assigning a policy of insurance on his life are provable in insolvency (z).

440. Person by whom proof to be made.—As a general rule, the person to prove is the person to whom the debt is due either at law or in equity (a). The rules which govern the right of proof are almost the same as those which govern the right to present a petition. Thus the guardian of a minor may prove on behalf of the minor. Similarly an executor or administrator may prove in respect of a debt due to the testator or intestate.

441. Benamidar.—It has been held that a benamidar cannot prove though he can sue for the debt (b).

441A. Executor's right of retainer.—An executor to whom a debt is due from the estate of the testator has no right of retainer under the Indian law (c) as he has under the English law; he must prove like any other creditor.

442. Holders of bills of exchange.—The holder of a bill of exchange is entitled to prove for his debt in the insolvency of each of the prior parties to

(t) *Re Mercantile Mutual Marine Insurance Association* (1884) 25 Ch. D. 415.

(u) *Re Coates* (1892) 9 Morr. 87.

(v) *Per Cave, J., in Re Stephenson* (1888) 20 Q.B.D. 540, 543.

(w) *Re Beale* (1888) 5 Morr. 37.

(x) *Victor v. Victor* (1912) 1 K.B. 247.

(y) *Re O'Gorman* (1899) 2 Q.B. 62. See

also *Re A Debtor* (No. 76 of 1929), (1929) B. & C. R. 48.

(z) See *Re Cumming* (1929) B. & C. R. 4.

(a) *Kelokey Charan v. Sreemutty Sarat* (1916) 20 C.W.N. 995, 37 I.C. 71.

(b) *Kelokey Charan v. Sreemutty Sarat*, *supra*.

(c) See Indian Succession Act, 1925, s. 323.

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the bill, and may receive a dividend from each estate upon his whole debt, provided he does not in the whole receive more than 16 annas in the rupee (*d*).

443. Double proof.—There cannot be a double proof against the same estate for the same debt, in other words, an insolvent estate ought not to pay two dividends in respect of the same debt. “If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full” (*e*). This may be explained by an illustration. *A* mortgages his property to *B*. Subsequently *A* transfers the equity of redemption of the property to his wife and covenants with her to discharge the mortgage debt, so that the wife may get the property free from the charge. The mortgage debt is not paid and *A* becomes insolvent. A proof is put in on behalf of the mortgagee. The wife is not entitled to prove in respect of the covenant to discharge the mortgage debt. Here the debtor has entered into two covenants with two different persons to pay the debt. He has entered into a contract with the mortgagee and also with his wife, but they are both covenants to pay the same debt, and if they were both allowed to prove in respect of that debt, higher dividends would be paid in respect of that debt than in respect of his debts to other creditors. This would violate the rule against double proof, and the wife therefore cannot be allowed to prove (*f*).

444. Proof by surety.—Where payment of a debt is guaranteed, and the principal debtor becomes insolvent, the creditor can prove for the full amount of the debt, and then recover from the surety the amount of the deficiency after receipt of dividends out of the debtor's estate. The surety has no right of proof, for if he were allowed to prove, it would be a case of double proof in respect of the same debt (*g*). If the surety pays the *whole* amount due to the creditor, he is entitled to prove and not the creditor. If the surety pays the entire debt after the creditor has lodged his proof, he will be entitled to the benefit of the proof made by the creditor, and the creditor must account to the surety for any dividends already received by him (*h*). A surety who pays only a *part* of the debt has no equity to stand in the place of the creditor (*i*).

Limited guarantee.—A surety may guarantee part only of a debt or he may guarantee the whole debt with a limit of liability. Whether a limited guarantee in any particular case is a guarantee for part only of a debt or a guarantee for the whole debt with a limit of liability is a question of construction in each case. The rule, as laid down in *Ellis v. Emmanuel* (*j*), is that

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| <p>(<i>d</i>) <i>Ex parte Rushforth</i> (1805) 10 Ves. 409, 416, 32 E.R. 903, 906.
(<i>e</i>) <i>Re Oriental Commercial Bank</i> (1871) L.R. 7 Ch. App. 99, 103.
(<i>f</i>) <i>Re Hoey</i> (1918 19) B. & C. R. 49.</p> | <p>(<i>g</i>) <i>Re Moss</i> (1905) 2 K.B. 307, 312.
(<i>h</i>) <i>Re Sass</i> (1896) 2 Q.B. 12, 15.
(<i>i</i>) <i>Ex parte Rushforth</i> (1805) 10 Ves. 409, 32 E. R. 93.
(<i>j</i>) (1876) 1 Ex. D. 157.</p> |
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where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is *prima facie* for part only of the debt; but a guarantee, limited in amount, for a debt already ascertained which exceeds that limit, is *prima facie* a guarantee for the whole debt with a limit of liability. Where the guarantee is for part only of a debt, the surety is entitled, on payment, to a rateable proportion of the dividends received by the creditor on the whole debt. For this the reason is that when the guarantee is for part only of a debt, that part is, as between the surety and the creditor, the *whole* debt. Where the guarantee is for the whole debt with a limit of liability, the surety on payment has no such right, and the creditor can prove against the estate of the principal debtor for the full amount of the debt notwithstanding that he has received from the surety the whole sum for which the surety was bound (*k*). In *Hobson v. Bass* (*l*) the guarantee was in these terms: "I hereby guarantee to you the payment of all goods you may supply to *E*. but so as my liability to you under this or any other guarantee shall not at any time exceed the sum of 250*l*." The creditor supplied goods to the amount of 657*l*. *E* then became bankrupt. The creditor proved for the whole sum and then called upon the surety to pay and the surety paid 250*l*. The creditor afterwards received a dividend on the 657*l*. It was held that the guarantee was for part only of the debt, and that the surety was entitled to a part of the dividend bearing to the whole the same proportion as 250*l*. to 657*l*. In *Ellis v. Emmanuel* (*m*), the surety and the principal debtor passed a bond to the creditor to secure a debt of 7,000*l*. then due from the debtor to the creditor with a proviso that the surety should not be liable under the bond for a sum exceeding 1,300*l*. It was held that the guarantee was for the whole amount with a limit of liability, and that the surety was not entitled on payment to any part of the dividends received by the creditor. The respective rights of the creditor and surety were thus stated by Vaughan Williams, J., in *Re Sass* (*n*); "I think that the common law right of the bank [creditor] here was to sue the debtor for the whole amount that was due from him to them, irrespective of the sum which was paid by the surety, unless that sum amounted to 20*s*. in the pound. When bankruptcy supervened the right of the principal creditor, the bank was to prove for that amount, unless there was a surety and that surety was a surety for a part of the debt. In that case, if the surety is a surety for a part of the debt, and the surety has paid that part, then by virtue of that payment the right of proof, which would have been the right of proof of the principal debtor, becomes *pro tanto* the right of proof by the surety. The surety has a right, having paid part of the debt in that way, to stand *pro tanto* in the

(*k*) *Ellis v. Emmanuel* (1876) 1 Ex. D. 157; *Re Sass* (1896) 2 Q.B. 12; *Bombay Company Limited v. Official Assignee of Madras* (1921) 44 Mad. 381, 63 I.C. 173, ('21)

A. M. 230; *Re Houlder* (1929) 1 Ch. 205.

(*l*) (1871) L.R. 6 Ch. App. 792.

(*m*) (1876) 1 Ex. D. 157.

(*n*) (1896) 2 Q.B. 12, 14.

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shoes of the principal creditor ; and even if the principal creditor has proved and has received the dividend, and the surety comes and repays the full amount, the principal creditor would then be trustee for the surety of the amount of the dividend which he had so received. In my judgment that right of the surety as against the principal creditor only arises in a case where the surety has paid the *whole* of the debt. It is quite true that where the surety is surety for a part of the debt as between the principal creditor and the debtor, the right of the surety arises merely by payment of the part because that part, as between him and the principal creditor, is the *whole*. Now for the purpose of this guarantee all I have to determine here is, whether as between the bank and the surety, the surety became a surety for the whole of the debt or for a part."

445. Accommodation bills.—A person who puts his name on a bill for the accommodation of another stands in the position of a surety, and, if the other person becomes insolvent, the surety may take up the bill and prove in the insolvency of the other (o). Where there are accommodation transactions on either side, and one of the two parties becomes insolvent, the solvent party must, before he can prove, take up his own bill and so exonerate the insolvent's estate from the original debt. To allow both the solvent party and the holder of the bills to prove against the estate would be to permit double proof in respect of the same debt (p). If both parties become insolvent, there can be no proof by either estate against the other, and the cash balance, that is, the balance including the sums, if any, paid by the insolvents respectively for the bills which they have taken up, is the sum to be proved on either side ; this is known as the rule in *Ex parte Walker* (q).

2. Proof of debts in general.

446. Proof in general under Presidency-towns Insolvency Act [Sch. II, rr. 1-8].—The rules as to proof of debts under the Presidency-towns Insolvency Act are contained in Sch. II of the Act. They are as follows :—

1. *Time for lodging proof.*—Every creditor shall lodge the proof of his debt as soon as may be after the making of an order of adjudication (r. 1). This rule is merely directory. Lapse of time before proof does not prevent a creditor, whether secured or unsecured, from coming in and proving so long as there are assets available for distribution, though he cannot disturb the distribution of past dividends. Dealing with this question Vaughan Williams, L. J., said (r) : " Now, according to my experience of bankruptcy practice,

(o) *Haigh v. Jackson* (1838) 3 M. & W. 598, 150 E. R. 1283.

(p) *Ex parte Read* (1822) 1 Gl. and J. 224.

(q) (1798) 4 Ves. 373, 31 E. R. 190.

(r) *Re Mc Murdo* (1902) 2 Ch. 684, 699 ;

Re Ramchandra Ganuji Waikar (1922) 29 Bom. L. R. 1167 ;
Krishna Chinnoo & Sons v. Matubhai (1929) 53 Bom. 290, 117 I. C. 440, (29) A. B. 107. See P.-t. I. A., s. 72 ; Prov. I. A., s. 63.

there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose; and, of course, in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the Court. If that is so, leave must be granted upon such terms as the Court may think just."

2. *Mode of lodging proof*.—A proof may be lodged by delivering or sending by post in a registered letter to the Official Assignee an affidavit verifying the debt (r. 2). The affidavit may be made by the creditor himself or by some person authorised by or on behalf of the creditor. If made by a person so authorised, it must state his authority and means of knowledge (r. 3). The affidavit must contain or refer to a statement of account showing the particulars of the debt, and must specify the vouchers, if any, by which the same can be substantiated. The Official Assignee may at any time call for the production of the vouchers. The affidavit must state whether the creditor is or is not a secured creditor (rr. 4-5).

3. *Cost of proving debts*.—A creditor must bear the cost of proving his debt unless the Court otherwise specially orders (r. 6). If a creditor appeals from the rejection of a proof, and succeeds in the appeal, he is allowed the costs, not of the proof, but of the appeal, out of the estate (s).

4. *Right to examine proofs*.—Every creditor who has lodged his proof is entitled to see and examine the proofs of other creditors at all reasonable times (r. 7).

5. *Admission and rejection of proofs*.—The Official Assignee must examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part, or require further evidence in support of it. If he rejects a proof he must state in writing to the creditor the grounds of the rejection (r. 25). He must inquire into the consideration for the debt and may for that purpose even go behind a judgment. "No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of his rights. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him" (t). See para 434 above.

A petitioning creditor must prove again in the usual way if he desires to vote or take a dividend. But there is no obligation on him to prove. If he lodges his proof, the Official Assignee has power to examine his proof and to reject it if he finds that there was no debt due from the insolvent to the petitioning creditor (u).

(s) *Re National Wholemeal Bread & Biscuit Co.* (1892) 2 Ch. 457.

(t) *Re Vann Loun* (1907) 1 K. B. 155, 162-163, affirmed in (1907) 2 K. B. 23, 30.

(u) *Moor v. Anglo-Italian Bank* (1879) 10 Ch. D. 681, 690; *Ketokey Charan v. Sreemutty Sarat* (1916) 20 C. W.N. 995, 37 I.C. 71.

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It is the duty of the Official Assignee to examine the proofs and to admit or reject them without undue delay (v). No creditor should be put to unnecessary expense or delay (w). Rules have been made by the High Courts of Bombay (x) and Rangoon (y) prescribing the time within which proofs must be admitted or rejected. It is strange that no such Rules have been made by the other High Courts.

6. *Withdrawing proof*.—A proof may be withdrawn before it has been dealt with by the Official Assignee (z).

447. Mode of proof under Provincial Insolvency Act (s. 49).—A debt may be proved under the Provincial Insolvency Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt. The affidavit must contain or refer to a statement of account showing the particulars of the debt, and must specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers. Under that Act it is for the Court to determine whether the persons alleging themselves to be creditors of the insolvent have proved their debts and to frame a schedule of creditors (sec. 33). The Official Receiver also may do so where the power to frame schedules of creditors has been delegated to him by Rules made in that behalf (a). As to the time for tendering proof of debts under the Provincial Insolvency Act and as to the framing of the schedule of creditors, see paragraph 328 above. In a recent Calcutta case it was held that sec. 49 of the Provincial Insolvency Act only specifies a simple mode of proof, and that it does not exclude any other mode of proof, and that a debt is proved within the meaning of sec. 78 of the Act if it was admitted by the judgment-debtor in the course of the insolvency proceedings (b). The question in that case was one of limitation under sec. 78 of the Act.

448. Expunging and reducing proof [P.-t. I. A., Sch. 2, rr. 26-27 ; Prov. I. A., s. 50].—Under the Presidency-towns Insolvency Act, if the Official Assignee thinks that a proof has been improperly admitted, the Court may on the application of the Official Assignee, after notice to the creditor, who made the proof, expunge the proof or reduce its amount. The Court may also expunge or reduce a proof upon the application of a creditor if the Official Assignee declines to interfere in the matter, or in the case of a composition or scheme upon the application of the insolvent.

(v) *Re Archibald Gilchrist Peace* (1921) 26 C. W. N. 653, 70 I. C. 507, ('21) A. C. 771.

(w) *Yokohama Specie Bank v. S. Cur- lender & Co.* (1926) 43 Cal. L. J. 436, 96 I. C. 459, ('26) A. C. 898.

(x) Rule 119.

(y) Rule 185.

(z) *Re Rhoades* (1899) 1 Q. B. 905, 909, (1899) 2 Q. B. 347.

(a) Prov. I. A., s. 80.

(b) *Krishna Chandra Das v. Jotindra Nath Porial* (1928) 48 Cal. L. J. 574, 114 I. C. 415, ('29) A. C. 159.

The provisions of the Provincial Insolvency Act are to the same effect. **Para. 448**
By sec. 50 of that Act it is provided that where the Receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the Receiver, and after notice to the creditor and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt. The Court may also after like enquiry expunge an entry or reduce the amount of a debt upon the application of a creditor where no Receiver has been appointed, or where the Receiver declines to interfere in the matter, or in the case of a composition or scheme, upon the application of the debtor. The power to admit or reject proofs may be delegated to the Official Receiver by Rules (c).

The right of a trustee in bankruptcy to apply to the Court to expunge or reduce a proof has long since been recognised in England. Mere lapse of time is no objection to the application, but if a proof is expunged or reduced, the trustee cannot compel the creditor to refund any sum overpaid, though he can deduct it from any future dividend (d). A creditor may apply to expunge or reduce a proof if the Official Assignee or Receiver declines to interfere (e). As a general rule the insolvent has no *locus standi* to apply to expunge or reduce a proof. Where an application was made by one creditor to expunge the proof of another creditor, but it was shown that such application, although made in the name of the creditor, was in reality for the benefit and on behalf of the bankrupt, it was held that it was not permissible to use the process of the Court to do indirectly that which the process of the Court will not allow to be done directly and that the application must be dismissed (f). The section allows the insolvent to apply to expunge or reduce a proof "in the case of a composition or scheme". The words "a composition or scheme" mean a composition or scheme accepted by the creditors (g). In one case the Court expunged the proof of certain creditors by reason of whose votes a proposal for a composition was rejected, it being shown that the debts claimed by them were not provable in bankruptcy (h).

The Official Receiver has no power to expunge a proof (i). If he thinks that a debt has been improperly entered in the schedule he may apply to the Court to expunge the entry (j). Nor has he power, while framing a schedule of creditors, to decide whether a mortgage set up by a creditor is

(c) Prov. I. A., s. 80.

(d) *Ex parte Harper* (1882) 21 Ch. D. 537.

(e) *Ex parte Merriman* (1884) 25 Ch. D. 144.

(f) *Re Tallerman* (1888) 5 Morr. 119; *Re Dashwood* (1886) 3 Morr. 257.

(g) *Re Benoit* (1909) 2 K. B. 784; *Ganga Sahai v. Mukarram Ali*

Khan (1926) 24 All. L. J. 441, 443, 97 I. C. 556, ('26) A. A. 361.

(h) *Ex parte Bluck* (1887) 4 Morr. 273.

(i) *Ahmad Musaji v. Mackenzie Stuart & Co.* (1928) 105 I. C. 366, ('28) A. S. 40.

(j) *Khadirshaw Maraiakar v. Official Receiver, Tinnevely* (1918) 41 Mad. 30, 45 I. C. 67.

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void under sec. 53 of the Provincial Insolvency Act; that is a matter to be inquired into by the Court (*k*).

449. Insolvency Rules as to proof of debts.—As to Rules made under the Presidency-towns Insolvency Act, see Madras Rules 82-85, Bombay Rules 116-121. and Rangoon Rules 179-188. As to Rules made under the Provincial Insolvency Act, see Calcutta Rules 17-18, Madras Rule VIII, Bombay Rules VIII and IX, and Allahabad Rules 20-21.

3. Proof by secured creditors.

[*P.-t. I. A., Sch. II, rr. 9-17; Prov. I. A., s. 47.*]

450. Rights of secured creditors in general.—A secured creditor "stands outside the bankruptcy" (*l*): He may rely on his security, or, as it is said, "sit upon his securities" (*m*), and need not prove. If the mortgage deed contains a power of sale which he can exercise without the intervention of the Court (*n*), he may exercise the power notwithstanding the insolvency, and apply the proceeds of sale in payment of principal, interest at the agreed rate up to the date of realization, and costs. The surplus, if any, belongs to the Official Assignee or Receiver. If the security is of such a nature that he cannot realize it without the intervention of the Court, he may bring a suit for sale and have the security realized through the Court. In this case also the proceeds of sale will be applied as aforesaid. As to who is and is not a secured creditor, see para. 258 above.

A secured creditor hardly comes in under the bankruptcy where the security is sufficient to pay his claim in full. It is only when the security is insufficient that he comes in under the insolvency to prove in respect of the deficiency. He cannot, however, take any benefit under the insolvency and will be excluded from all share in any dividends unless he complies with the rules stated below.

451. Proof by secured creditors.—A secured creditor who comes in under the insolvency has the following three courses open to him, namely:—

- (1) he may realize his security and then prove for the balance;
- (2) he may surrender his security and prove for the whole debt;
- (3) he may state in his proof the value at which he assesses the security and prove for the balance after deducting the assessed value.

This subject may be examined a little more fully.

452. (1) Realization [*P.-t. I. A., Sch. II, r. 9; Prov. I. A., s. 47 (1)*].—If a secured creditor realizes his security, he may prove for the

(*k*) *Muthuswami Chettiar v. Official Receiver, North Arcot* (1926) 51 Mad. L. J. 287, 97 I. C. 407, ('26) A. M. 1019.

(*l*) *White v. Simmons* (1871) L. R. 6 Ch. App. 555, 557.

(*m*) *Re Savin* (1872) L. R. 7 Ch. App. 760, 765; *Hansraj v. Official Liquidators* (1929) 51 All. 695, 119 I. C. 273, ('29) A. A. 353.
(*n*) See Transfer of Property Act, 1882, s. 69.

balance due to him after deducting the net amount realized. The balance for which proof can be made is arrived at by deducting the proceeds of sale from the amount due for principal, interest calculated at the agreed rate up to the date of the order of adjudication, and costs. No proof can be made for interest accruing after the order of adjudication.

453. (2) Surrender [P.-t. I. A., Sch. II, r. 10; Prov. I. A. s. 47 (2)].—The second course open to a secured creditor is to surrender or relinquish his security for the general benefit of the creditors, in which case he may prove for his whole debt. His position on surrendering or relinquishing his security is that of an unsecured creditor. The surrender by a first mortgagee of his security puts the Official Assignee or Receiver in his place, and does not accelerate the rights of subsequent mortgagees (o). Where a secured creditor not only proves for the whole debt, but receives a dividend on it, he must be taken to have surrendered or relinquished his security (p).

By Sch. 1, r. 2, of the Presidency-towns Insolvency Act it is provided that for the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence. Where a creditor omits to value his security by reason of erroneous information leading him to suppose it to be worthless, there is not an omission to value the security which arises from inadvertence within the meaning of that rule. If he votes in respect of his whole debt, he will be deemed to have surrendered his security and no amendment of the proof will be allowed (q). If a creditor deliberately votes in respect of his whole debt without mentioning his security, he will not be allowed to amend, for the case is not one of inadvertence (r).

454. (3) Assessment of value [P.-t. I. A., Sch. II, rr. 11-12 (1); Prov. I. A., s. 47 (3) & (4)].—Thirdly, if the secured creditor neither realizes nor surrenders his security, he must, before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and he will be entitled to a dividend only in respect of the balance due to him after deducting the value so assessed. Where a security is so valued, the Official Assignee, and, under the Provincial Insolvency Act, the Court, may at any time redeem it on payment to

(o) *Cracknall v. Janson* (1877) 6 Ch. D. 735.

(p) *Union Bank of Bijapur v. Bhimrao* (1929) 31 Bom. L. R. 463, ('29)

A. B. 258.

(q) *Re Piers* (1898) 1 Q. B. 627.

(r) *Re Rowe* (1904) 2 K. B. 489.

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the creditor of the assessed value. Where the *petitioning creditor* is a secured creditor and has valued his security for the purpose of the petition, the Court will not, at the hearing of the petition, inquire into its correctness, unless the estimate is plainly a sham. Nor can the security be redeemed at the value estimated in the petition unless the creditor proves. When, however, the creditor comes in to prove, he will not be allowed to depart from his estimate, at all events in the absence of mistake; and it is doubtful whether even in the case of a mistake the creditor can amend his estimate of the value (s).

What securities must be valued.—The expression “secured creditor” is defined as meaning “a person holding a mortgage, charge or lien on the property of the debtor as a security for a debt due to him from the debtor” (t). The security must be “on the property of the debtor.” A security over the property of one who is not the debtor is not required to be valued or given up for the purposes of proof. The only security to be valued is a security which, if given up, would go to augment the estate against which proof is made (u). Such being the case the joint estate of partners is, for the purposes of proof by secured creditors, to be considered as different from the separate estate of any partner. Therefore, a partnership creditor, having a security for his debt on the separate estate of one partner, is entitled to prove against the joint estate without valuing or giving up his security, and conversely a creditor of one partner holding security over the joint estate is entitled to prove against the separate estate without valuing or giving up the security over the joint estate (v).

Lumping securities.—A secured creditor to whom several debts are due and who holds separate securities for them may lump together the debts and securities (w). But although this may be done under ordinary circumstances, yet when the debts are distinct in substance, with different rights over as against third persons, or with different securities, the Court may insist that proof shall not be made for a lump sum, and will require the creditor to distinguish and specify the particular debts and the values of the securities for the same respectively (x). A secured creditor, who lumps together several securities at one assessed value, does not thereby get against a subsequent encumbrancer any right of consolidation which he had not before (y).

455. Amendment where valuation made on a mistaken estimate [P.-t. I. A., Sch. II, rr. 13-14].—By Sch. II, rr. 13-14, it is

(s) *Re Vautin* (1899) 2 Q. B. 549;

Re Button (1905) 1 K. B. 602.

(t) See Prov. I. A., sec. 2 (1) (e); B. A., 1914, s. 167; *Krishna Chinnoo & Sons v. Matubhai* (1929) 53 Bom. 290, 306, 117 I. C. 440, ('29) A. B. 107.

(u) *Ex parte West Riding Union Banking Co.* (1881) 19 Ch. D. 105; (1929) 53 Bom. 290, 117 I. C. 440,

('29) A. B. 107, *supra*.

(v) *Ex parte Peacock* (1825) 2 Gl. and J. 27; *Ex parte Bowden* (1832) 1 Deac. and Ch. 135; *Ex parte West Riding Union Banking Co.* (1881) 19 Ch. D. 105.

(w) *Re Smith & Logan* (1895) 2 Mans. 70.

(x) *Re Morris* (1899) 1 Ch. 485.

(y) *Re Pearce's Trusts* (No. 1), (1909) 2 Ch. 492.

provided that where a creditor has valued his security in his proof, he may at any time amend the valuation and proof on showing to the satisfaction of the Official Assignee or the Court that the valuation and proof were made *bona fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation. The amendment may be made even after a tender by the Official Assignee of the assessed value which the creditor has refused to accept (z). Where a valuation has been increased by amendment, the creditor must repay any amount of dividend which he has received in excess of that to which he would have been entitled on the basis of the amended valuation, and where a valuation has been reduced by amendment he will be entitled to receive out of any money for the time being available for dividend, before it is made applicable to the payment of any future dividend, any dividend or share of dividend which he has failed to receive by reason of the inaccuracy of the original valuation, but not so as to disturb any dividend declared before the amendment. This rule is not contained in the Provincial Insolvency Act, but it will apply, it seems, to cases under that Act. In a Bombay case Marten, C.J., observed that the provisions as to the rights of secured creditors in the Provincial Insolvency Act were "unfortunately in a very attenuated form" (a). The policy of the legislature seems to have been to shorten that Act as much as possible with the result that the Courts have in several cases to fall back upon the English law.

456. Amendment where security subsequently realized [P.-t. I. A., Sch. II, r. 15; Prov. I. A., s. 47 (5)].—If a creditor after having valued his security subsequently realizes it, the net amount realised must be substituted for the amount of any valuation previously made by the creditor and will be treated in all respects as an amended valuation made by the creditor.

The same provision applies under the Presidency-towns Insolvency Act where the security has been realized under the provisions of rule 12 of Sch. II. See para. 458 below.

457. Penalty for non-compliance with the above rules [P.-t. I. A., Sch. II, r. 16; Prov. I. A., s. 47 (6)].—Where a secured creditor does not comply with the foregoing rules, he will be excluded from all share in any dividend.

458. Rights of secured creditor and Official Assignee under the Presidency-towns Insolvency Act in respect of securities valued by the creditor [P.-t. I. A., Sch. II, r. 12 (2)].—By Sch. II, r. 12 (2) of the Presidency-towns Insolvency Act, it is provided that if the Official Assignee is dissatisfied with the value at which a security is assessed, he may

(z) *Re Newton* (1896) 2 Q. B. 403.

(a) *Union Bank of Bijapur v. Bhimrao*

(1929) 31 Bom. L. R. 463, ('29)
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require that the property comprised in the security be sold, the creditor, and the Official Assignee having a right to bid if the sale is by public auction. It is also provided by the same rule that the creditor may at any time, by notice in writing, require the Official Assignee to elect whether he will or will not exercise his power of redeeming the security or require it to be sold, and if the Official Assignee does not within six months after receiving the notice signify in writing to the creditor his election to exercise the power, he cannot exercise it after that period; and the equity of redemption which is vested in the Official Assignee will vest in the creditor, and the amount of his debt will be reduced by the value which he has put on the security. The effect of this rule is that if the Official Assignee fails within six months to give written notice to the creditor of his election to exercise the power, the mortgage is foreclosed and the secured creditor becomes the absolute owner of the property, in which case, if the property subsequently fetches more than the full amount of the mortgage claim, the creditor will be entitled to retain the whole, even if the whole exceeds sixteen annas in the rupee (see para 459 below). This rule is not contained in the Provincial Insolvency Act and it does not apply to cases under that Act.

459. Limit of receipt [P.-t. I. A., Sch. II, r. 17].—Except where the equity of redemption vests in a secured creditor as stated in para. 458 above, a creditor shall in no case receive more than sixteen annas in the rupee and interest as provided by the Act.

460. Special rules under the Presidency-towns Insolvency Act for inquiry into mortgage and for sale of mortgaged property [P.-t. I. A., Sch. II, rr. 18-21].—Where the insolvent has mortgaged his immovable property, and the mortgage is of such a nature that it cannot be realized without the intervention of a Court, or the Official Assignee disputes the validity of the mortgage, the mortgagee, or the Official Assignee with the consent of the mortgagee, may apply to the Insolvency Court for an inquiry into the validity of the mortgage and for further directions. The Court will then proceed to inquire whether the applicant is the mortgagee, and for the purposes of such inquiry may examine such parties as it thinks fit, and if the mortgage is proved, will direct an account to be taken for ascertaining what is due to the mortgagee upon the mortgage, and will make an order that the property be sold. The Official Assignee will, unless it is otherwise ordered, have the conduct of the sale. The mortgagee may bid and purchase at the sale. The proceeds of the sale, after payment of costs of the application and sale and the commission of the Official Assignee, will be applied in payment of "principal, interest and costs." In making up the accounts, interest will be calculated at the agreed rate up to the date of the order of adjudication (b). The High Court of Rangoon has held that interest is

(b) *Re Bonacino* (1894) 1 Mans. 59;
Quartermaine's case (1892) 1 Ch.

639. See also *Baldwin, Law of Bankruptcy*, 11th ed., p. 627.

to be calculated up to the date of realization (c), but this decision, it is submitted, is incorrect. It is against the fundamental principle recognized in bankruptcy that after adjudication creditors both secured and unsecured stand on the same footing so far as regards interest. Moreover, it is inconsistent with the provisions of sec. 49 (6) of the Presidency-towns Insolvency Act which says that the surplus shall be applied in payment of interest *from the date of the order of adjudication* at the rate of six per cent. per annum on all debts proved in the insolvency. If there is a surplus after making the aforesaid payments, it belongs to the Official Assignee. If there is a deficiency, the mortgagee may prove in respect of it. As regards the parties to the conveyance all such parties are to join as the Court may direct (d). No formal order of confirmation of sale is necessary; but if a sale is impeached, the Court has the power under these rules to inquire into its validity and to confirm it or set it aside (d1).

The above rules provide a summary procedure for the realization of a security, and it is open to any person claiming to be a mortgagee of an insolvent's property, whether his mortgage is contested or not, and whether he has a power of sale or not, to apply under these rules. The rules apply whether the mortgage is of a legal or equitable nature.

The mortgagee is not obliged under these rules to implead any creditor or any other person than the Official Assignee. But this does not preclude a creditor who disputes the mortgage from appearing at the hearing and contesting the mortgagee's claim. The summary procedure provided by these rules to enforce the rights of a mortgagee is not intended to exclude persons who may have rights contrary to his own. A duty is cast upon the Court by rule 18 to hold an independent enquiry not merely to determine issues between the mortgagee and the Official Assignee, but to inquire whether such person is the mortgagee and for what consideration, and any creditor who disputes the validity of the mortgage is entitled to be heard (e). A purchaser from the insolvent whose purchase is not challenged is not a necessary or proper party to a proceeding under these rules (f).

If a mortgagee takes proceedings under rule 18, and the Official Assignee intimates to the Court that he is proceeding under sec. 36 of the Presidency-towns Insolvency Act for the purpose of arriving at a decision whether he should take any proceedings under sec. 55 of the Act to set aside the mortgage, the Court should not proceed with the inquiry, but should stay the proceedings before it to enable the Official Assignee to complete the examination of the insolvent and others under sec. 36 and to apply to set aside the mortgage under sec. 55 of the Act (g).

It has been held in Calcutta that the Registrar has no jurisdiction under rule 18 to deal with the question of the validity or otherwise of a mortgage (h).

(c) *In the matter of Bulabai Sagermull* (1924) 2 Rang. 197, 83 I.C. 576, ('24) A.R. 352.

(d) See Rangoon Rules 189-192.

(d1) *Sankara Raju v. Kuppammal* (1930) 53 Mad. 233.

(e) *Tyeb Ali v. Purna* (1926) 43 Cal. L.J. 219, 93 I.C. 898, ('26) A.C.

618.

(f) *Jarwa Bai v. Pitambar* (1916) 24 Cal. L.J. 149, 36 I.C. 689.

(g) *Tyeb Ali v. Purna* (1926) 43 Cal. L.J. 219, 93 I.C. 898, ('26) A.C. 618.

(h) *Re Lalbihari Shah* (1920) 47 Cal. 721, 60 I.C. 889.

4. *Periodical payments.*

Paras. 461. Periodical payments [P.-t. I. A., Sch. II. r. 22].—When any
461, 462 rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to day.

This rule is not contained in the Provincial Insolvency Act, but the same principle will apply.

5. *Proof for interest.*

[P.-t. I. A., Sch. II, rr. 23-24; Prov. I. A., ss. 45, 48.]

462. Proof for interest as a general rule allowed only up to adjudication.—Prior to the Bankruptcy Act, 1849, interest was not provable on simple contracts unless it was expressly stipulated for. The first enactment which allowed proof for interest where it was not stipulated for was sec. 57 of the statute 6 Geo. 4, passed in 1825. That section enabled the holder of a bill of exchange or promissory note which was overdue at the issuing of the commission to prove for interest, even if it was not stipulated for, at such rate as was then allowed by the Court of King's Bench in actions upon bills or notes, but it was allowed only up to the date of the commission. Then came the Bankruptcy Act, 1849, which by sec. 180 allowed proof for interest on all debts though interest was not agreed upon, at the rate of 4l. per cent. per annum, up to the date of the fiat or filing of the petition for adjudication. The Bankruptcy Act, 1869, also contained a provision that interest on any debt provable in bankruptcy may be allowed under the same circumstances in which interest would have been allowable by a jury if an action had been brought for such debt (i). Interest accruing after adjudication was not admitted to proof, and this is still the general rule (j). To this rule there are two exceptions, one where the debt is payable at a future date with interest (k), and the other where there is a surplus (l).

The reason why interest accruing after adjudication is not to be admitted to proof is that "the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that date" (m). It makes no difference in the application of the rule that the principal and interest are lumped together in one sum. "The Court of Bankruptcy is a Court of Equity, and has regard to the substance of a transaction" (n). The rule applies in whatever guise interest is brought into the contract. Thus where a debtor

(i) B. A., 1869, s. 36.

(j) *Ex parte Bath* (1882) 22 Ch.D. 450; *Re Browne & Wingrove* (1891) 2 Q.B. 574, 578-580.

(k) P.-t. I. A., Sch. II, r. 24; Prov. I. A., s. 45.

(l) P.-t. I. A., s. 49 (6); Prov. I. A.,

s. 61 (6).

(m) *Re Savin* (1872) L. R. 7 Ch. App. 760, 764, per Sir W.M. James, L.J.

(n) *Ex parte Bath* (1882) 22 Ch.D. 450, 454; *Re Holland* (1894) 1 Mans. 509.

executed a writing styled "agreement of commission" whereby he agreed to pay Rs. 1,300 being the amount of the loan within two years and nine months and to pay "commission" on Rs. 1,300 at the rate of Rs. 10 per cent. per month, it was held that the commission was in the nature of interest and that it could not be admitted to proof after the date of the order of adjudication (*o*). A premium on a loan, however, is in the nature of principal and not in the nature of interest and it may be proved for just as principal (*p*).

463. Where interest is not stipulated for [P.-t. I. A., Sch. II, r. 23 (1); Prov. I. A., s. 48 (1)].—A debt may be provable in insolvency. It may also be overdue at the date of the order of adjudication. Where these two conditions exist, but interest is not reserved or agreed upon, the creditor may prove for interest at a rate not exceeding six per cent. per annum—

- (a) if the debt or sum is payable by virtue of a written instrument at a certain time, *from* the time when such debt or sum was payable to the date of the order of adjudication; or,
- (b) if the debt or sum is payable otherwise, *from* the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment *to* the date of the order of adjudication.

This rule embodies the provisions of sec. 1 of the Interest Act, 1839, just as the corresponding English rule (*q*) embodies the provisions of sec. 28 of the statutes 3 and 4 Will. 4, c. 42, being the Civil Procedure Act, 1833 (*r*). The decisions on the Interest Act, 1839, sec. 1, as to the meaning of the expressions in that section apply equally to cases under this rule (*s*). In England, where interest is not agreed upon, the maximum rate is four per cent. per annum, and where it is agreed upon, the maximum rate is five per cent. per annum (*t*). In India the rate is the same in both cases, that is, six per cent. per annum (*u*).

464. Where interest is stipulated for [P.-t. I. A., Sch. II, r. 23 (2); Prov. I. A., s. 48 (2)].—Where a debt which has been proved in

- (*o*) *Subbarayalu v. Rowlandson* (1891) 14 Mad. 133.
- (*p*) *Ex parte Bath* (1884) 27 Ch. D. 509.
- (*q*) B. A., 1914, Sch. II, r. 21; B. A., 1883, Sch. II, r. 20.
- (*r*) *Re Evans* (1897) 4 Mans. 114, 116.
- (*s*) For cases under the Interest Act, see *Govindan Nair v. Cheral* (1915) 38 Mad. 464, 30 I. C. 432 ("debt"); *Omrita Nath v. Administrator-General of Bengal* (1898) 25 Cal. 54 ("written instrument"); *Surya Narain v. Pratap Narain* (1899) 26 Cal. 955 ("payable at

- a certain time"); *Kuppasami Pillai v. Madras Electric Tramway Co., Ltd.* (1900) 23 Mad. 41 ("demand"); *Fezali v. Mahomed* (1905) 7 Bom. L. R. 798 ("demand in writing"); *Marshall v. Bengal Spinning and Weaving Co.* (1896) 1 C. W. N. 219 (compound interest).
- (*t*) B. A., 1914, sec. 66, and Sch. II, r. 21.
- (*u*) P.-t. I. A., Sch. II, r. 23; Prov. I. A., s. 48.

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insolvency includes interest or any pecuniary consideration in lieu of interest, the interest or consideration will, *for the purposes of dividend*, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

The above rule only affects the creditor's rights as to dividend, and not as to proof. Thus if the rate of interest agreed upon is eight per cent., the interest, for the purposes of dividend, will be calculated at six per cent. The creditor may prove for the remaining two per cent., but in respect of the excess he will receive a dividend only after all the debts have been paid in full (v). He cannot, however, claim the excess even if there is a surplus after payment of the debts in full, unless he has first proved; the reason is that the rule applies only to "a debt which has been proved" (w). Where a judgment is obtained upon a debt which bears a higher rate of interest than that allowed by the judgment, the creditor cannot prove for interest at a rate higher than that allowed by the judgment (x). The rule now under consideration applies only to unsecured debts (y). As to interest on mortgage debts, see para. 467 below.

465. Debts payable at a future date [P.-t. I. A., Sch. II, r. 24; Prov. I. A., s. 45].—A creditor may prove for a debt not payable when the debtor is adjudged insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per cent. per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Rebate of interest.—The effect of these rules is that when a debt is by contract payable at a future date, with interest in the meantime, and the debtor becomes insolvent before the time of payment has arrived, the creditor may prove for interest accruing *after* the date of the order of adjudication. This is one of the exceptions to the general rule that interest cannot be proved for after adjudication. In such a case the proper course is to prove the principal sum as a present debt; then to deduct a rebate of interest at six per cent. per annum from the dividend upon it; and then to value and prove for the liability to pay interest, the dividend on which is to be paid without any rebate as the rule applies only to debts and not to interest. If the rate of interest contracted for is six per cent. per annum, the proper course is simply to prove for the principal sum as a present debt, without any rebate, for the value of the liability to pay interest and the rebate are then equal and they neutralize each other (z).

(v) *Re Herbert* (1892) 9 Morr. 253 ;
Kanto Mohan v. Galstaun (1930)
 51 Cal. L. J. 283, 295.
 (w) *Re Herbert*, *supra*.

(x) *Ex parte Fewings* (1884) 25 Ch. D. 338.

(y) *Re Fox and Jacobs* (1894) 1 Q.B. 438.

(z) *Re Browne & Wingrove* (1891) 2 Q. B. 574.

466. Interest after date of order of adjudication.—There are only two cases in which interest accruing subsequent to the order of adjudication may be made the subject of proof. One of them is where a debt is by the contract payable at a future time, with interest in the meantime. This has been dealt with in para. 465 above. The other is where there is a surplus after payment of all the debts (a). As to the surplus the rule is that it should be applied in payment of interest from the date of the order of adjudication at the rate of six per cent. per annum on all debts proved, whether they bear interest or not (b). The Court has no power to award interest at a rate higher than six per cent. per annum (c).

467. Interest on mortgage debt.—A mortgagee may sell the mortgaged property in the exercise of the power of sale reserved to him under the mortgage deed, or he may bring a suit for the sale of the mortgaged property and have the property sold by the Court. In either case he is entitled to apply the proceeds of sale in payment of what is due to him for principal, interest at the agreed rate up to the date of realization (d), and costs (e). If there is a surplus, it belongs to the Official Assignee or Receiver. If there is a deficiency, the mortgagee may prove in respect of it, but he is not entitled in that case to apply the proceeds of sale in payment of interest subsequent to the order of adjudication (f), and the proof will be limited to what was due for principal and interest at the contract rate (g) at the date of the order of adjudication after deducting therefrom the proceeds of sale (h). He is, however, entitled to set off the income received from the security since the date of the order of adjudication against interest accruing subsequent to that date (i). The above rules apply whether the mortgagee realizes his security or assesses the value thereof (j). In England, since the Bankruptcy and Deeds of Arrangement Act, 1913 (k), a secured creditor cannot allocate the proceeds of sale to interest and prove for the principal as he can in India. The proceeds must be appropriated to principal and interest in the proportion that the principal bears to the interest at the agreed rate.

467A. Usurious Loans Act.—The Court has the power under the Usurious Loans Act, 1918, to reduce the rate of interest. This applies not only where the debtor is adjudged insolvent, but also a surety for the debtor (k1).

- (a) P.-t. I. A., s. 49 (6); Prov. I. A., s. 61 (6).
- (b) *Re Browne and Wingrove* (1891) 2 Q. B. 574; *Re Mahomed Shah* (1886) 13 Cal. 66.
- (c) *Ganga Sahai v. Mukarram Ali Khan* (1926) 24 All. L. J. 441, 97 I. C. 556, ('26) A. A. 361.
- (d) *Jugal Kishore v. Bunkim Chandra* (1919) 41 All. 481, 51 I. C. 192. As to the rule of *damdupat*, see *In the matter of Harilal Mullick* (1906) 33 Cal. 1269.
- (e) See *Re Pearce* (1909) 2 Ch. 492, 504.
- (f) *Quartermaine's case* (1892) 1 Ch.

- 639; *Re Bonacino* (1894) 1 Mans. 59; *Ramchand v. Bank of Upper India, Ltd.* (1922) 3 Lah. 50, 67, 74 I. C. 187, ('22) A. L. 281; *Oppenheimer v. M. E. Moola Sons, Ltd.* (1929) 7 Rang. 514 [company in winding up].
- (g) *Re Fox & Jacobs* (1894) 1 Q. B. 438.
- (h) *Quartermaine's case* (1892) 1 Ch. 639.
- (i) *Quartermaine's case* (1892) 1 Ch. 639.
- (j) *Re Fox & Jacobs* (1894) 1 Q. B. 438.
- (k) S. 22, now B. A., 1914, s. 66 (2), (b) and (c).
- (k1) *Bainath v. Estate of E. C. Dannel* (1925) 47 All. 745, 88 I. C. 78.

6. *Mutual dealings and set-off.*

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468. Mutual dealings and set-off [P.-t. I. A., s. 47 ; Prov. I. A., s. 46].—It is provided by both the Acts that where there have been mutual dealings between the insolvent and a creditor proving or claiming to prove a debt under the Acts, an account must be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party must be set off against any sum due from the other party, and the balance of the account, and no more, is to be claimed or paid on either side respectively.

469. Earlier law as to set-off.—Long before the making of any statutory provision on the subject it was the practice in bankruptcy, where there was a debtor and creditor account between the bankrupt and another person, to take the account between them and adjust the balance due from the one party to the other (*l*). This, however, was not done where the debts were unconnected, with the result that if *A* owed *B* Rs. 1,000, and *B* owed *A* Rs. 1,500, and *B* became bankrupt, *A* was bound to pay the whole of Rs. 1,000 which he owed to *B*, and had to prove in the bankruptcy for the Rs. 1,500 which *B* owed him and to accept such dividend as he could get on it. This led to great injustice, and to remedy the injustice there was legislation from time to time (*m*) first allowing a set-off in the case of mutual debts, and then extending it to the case of mutual credits. By sec. 39 of the Bankruptcy Act, 1869, the application of the principle of set-off was substantially extended by including mutual dealings, and the category of provable debts was at the same time enlarged.

This section is based on sec. 39 of the Bankruptcy Act, 1869. That section was reproduced with certain alterations in sec. 38 of the Bankruptcy Act, 1883. Sec. 38 of the Act of 1883 is re-enacted in sec. 31 of the Bankruptcy Act, 1914.

470. Set-off under the Code of Civil Procedure, 1908.—The fundamental distinction between a set-off under O. 8, r. 6, of the Code of Civil Procedure, 1908, and a set-off in insolvency is that while under the Code unliquidated damages cannot be set off against the plaintiff's demand, such damages can be set off in insolvency if they arise out of contract.

471. What are mutual dealings.—The expression "mutual dealings" is very wide. It includes the case where two persons owe each other debts *presently* payable (*n*), and the case where a debt is *immediately* due from one party but due *at a future date* from the other (*o*). It also includes the case where a person owes a debt to another, but has a claim against the other for

- (*l*) *Young v. Bank of Bengal* (1836) 1 M. I.A. 87, 142-143 ; *Chapman v. Derby* (1712). 2 Vern. 117, 23 E.R. 684.
(*m*) *Re Daintrey* (1900) 1 Q. B. 546, 573.

- (*n*) This is a case of "mutual debts."
(*o*) *Ex parte Prescott* (1753) 1 Atk. 229 ; *Young v. Bank of Bengal* (1836) 1 M.I.A. 87, 145. This is a case of "mutual credits."

unliquidated damages for breach of contract. Thus damages for breach of a lessor's covenant may be set off against a claim for rent (*p*). Similarly damages for non-delivery of goods under a contract may be set off against the price of goods already delivered under the contract (*q*). The rule applies not only to unliquidated damages for breach of contract, but also to unliquidated damages arising out of contract. Thus damages for fraudulent misrepresentation by the insolvent on the sale of goods may be set off in a suit by the Official Assignee or Receiver for the price of the goods (*r*). On the same principle where a sale of goods upon credit is induced by the fraud of the purchaser and the purchaser becomes insolvent, damages for such fraud may be set off against a claim under the contract (*s*). The rule applies even where the mutual dealings result in a debt which is not merely contingent, but also conditional (*t*). The fact that one debt is secured and the other unsecured does not make any difference. Thus if the insolvent owes to *A.B.* Rs. 3,000, and *A.B.* owes to the insolvent Rs. 2,000, and the insolvent has a lien for that amount on the goods of *A.B.*, *A.B.* is entitled to have the sum of Rs. 2,000 set off against his claim so as to free the goods from the lien and to prove for the balance of Rs. 1,000 against the insolvent's estate. The Official Assignee or Receiver cannot claim that *A.B.* should pay the debt of Rs. 2,000 before the goods are delivered to him (*u*).

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472. No set-off unless claims result in pecuniary liabilities.—

No right of set-off arises unless the claims on each side are such as result in pecuniary liabilities arising out of contract. Thus if *A* is in bare custody of goods belonging to the insolvent, and the insolvent owes a debt to *A*, *A* is not entitled to set off the debt against the claim for goods, for an owner of goods is entitled to their return *in specie* (*v*). Similarly there is no right of set-off in respect of money or goods deposited for a specific purpose which has not been carried out (*w*), or of a balance of such money remaining after the purpose has been carried out (*x*). But where there is a debt on one side, and delivery of goods with instructions to sell on the other, the delivery coupled with the instructions constitutes a giving of credit by the owner,

- (*p*) *Booth v. Hutchinson* (1872) L. R. 15 Eq. 30 ; *Jeffery v. Official Assignee of Rangoon* (1928) 6 Rang. 46, 109 I.C. 695, ('28) A. R. 111. This is a case of "mutual dealings."
- (*q*) *Peat v. Jones* (1881) 8 Q.B.D. 147.
- (*r*) *Jack v. Kipping* (1882) 9 Q. B. D. 113, s.c. in appeal *Mersey Steel & Iron Co. v. Naylor Benzon & Co.* (1884) 9 App. cas. 434.
- (*s*) *Tilley v. Bowman Ltd.* (1910) 1 K. B. 745.
- (*t*) *Re Taylor* (1910) 1 K. B. 562; *Re Daintrey* (1900) 1 Q. B. 546.

- (*u*) *Ex parte Barnett* (1874) L. R. 9 Ch. App. 293. See also *Re Thorne* (1914) 2 Ch. 438, a case of a company in winding up, and *Alsager v. Currie* (1844) 12 M. & W. 751, 152 E. R. 1402.
- (*v*) *Eberle's Hotels & Restaurant Coy. v. Jonas* (1887) 18 Q. B. D. 459.
- (*w*) *Re Pollit* (1893) 1 Q. B. 455 (deposit of money); *Buchanan v. Findlay* (1829) 9 B. & C. 738, 109 E.R. 274 (bills of exchange).
- (*x*) *Re Mid-Kent Fruit Factory* (1896) 1 Ch. 567; *Young v. Bank of Bengal* (1836) 1 M. I. A. 87, 146.

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and the section applies. Thus where the insolvent, who was indebted to his auctioneers for commission in respect of goods already sold, delivered some pictures to them to sell and receive the proceeds, and the pictures were sold, it was held that the auctioneers were entitled to deduct from the proceeds the amount due to them (y).

473. Debts must be between same parties.—In order that debts may be set off, they must be between the same parties. Therefore, a joint debt cannot be set off against a separate debt, nor a separate debt against a joint debt (z).

474. Debts must be due in same right.—Debts cannot be set off unless they are due to and from the same persons in the same right. Thus a debt due to an executor in right of his testator cannot be set off against a debt due from him personally (a). A debt due to or from the Official Assignee in the course of the administration of the insolvent's estate cannot be set off against a debt due from or to the insolvent before his insolvency (b). If a payment is made by a husband to his wife before insolvency, and the transaction is set aside as a voluntary settlement, and the Official Assignee claims the amount from the wife, the wife cannot set off a debt due to her from her husband against the claim of the Official Assignee. The reason for this is that the amount is payable to the Official Assignee not because it was a debt due to the insolvent, but because it is payable to the Official Assignee *quid* Official Assignee on the setting aside of the transaction (c). An apparent exception to the rule that the debt must be due in the same right exists in the case of a sale of goods by a factor in his own name for an undisclosed principal. In such a case the buyer, in the event of the factor's insolvency before the goods are paid for, may set off a debt due to him from the factor personally against the principal's claim for the price of the goods as if the factor were the principal (d).

475. Contributory of company.—A shareholder in a company who is also a creditor of the company is not, in the event of the company being wound up, entitled to set off the debt due to him against the calls (e); but if he becomes insolvent, the rule in insolvency prevails, and the Official Assignee or Receiver may set off the debt due to the contributory against the calls (f).

(y) *Palmer v. Day & Sons* (1895) 2 Q.B. 618.

(z) *Ex parte Twogood* (1805) 11 Ves. 517, 32 E.R. 1189; *Alliance Bank of Simla v. Mohan Lal* (1927) 8 Lah. 105, 101 I.C. 762, ('27) A.L. 228; *Trimbak v. Ramchandra* (1921) 45 Bom. 121, 63 I. C. 916, ('21) A. B. 66.

(a) *Bishop v. Church* (1748) 3 Atk. 691, 26 E.R. 1197.

(b) *West v. Pryce* (1825) 2 Bing. 455, 130 E.R. 382; *Alloway v. Steere* (1882) 10 Q. B. D. 22.

(c) *Lister v. Hooson* (1908) 1 K. B. 174.

(d) *Ex parte Dixon* (1876) 4 Ch. D. 133; *Lee v. Bullen* (1858) 27 L. J. Q. B. 161.

(e) *Grissell's case* (1866) L. R. 1 Ch. App. 528.

(f) *Re Universal Banking Corporation* (1870) L. R. 5 Ch. App. 492.

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476. Costs.—Costs of proceedings in insolvency cannot be set off against costs in another Court though the parties to the proceedings may be the same. If a set off were allowed, no debtor could get a solicitor to act for him in insolvency proceedings, because to allow the set off is to defeat the solicitor's lien for costs. Thus if a judgment-creditor presents an insolvency petition against the debtor, and the petition is dismissed with costs, the judgment debt cannot be set off against the costs of the petition (*g*). But the costs of proceedings in the Insolvency Court can be set off against costs of other proceedings in the same Court (*h*).

477. Date for ascertaining balance.—The date of the order of adjudication is the time for ascertaining what mutual debts, credits and dealings were existing between the insolvent and other persons (*i*).

478. Effect of notice of presentation of petition.—The extension of the right of set off proceeded almost on the same lines as the enlargement of the category of provable debts. What was not a provable debt was not a subject of set off. Under the English Law a person having notice of any act of bankruptcy available against the debtor cannot prove for any debt contracted by the debtor subsequently to the date of his so having notice (*j*). He cannot therefore set off any debt contracted with notice of an act of bankruptcy (*k*). Similarly under the Presidency-towns Insolvency Act, sec. 46 (2), a person having notice of the presentation of any insolvency petition by or against the debtor cannot prove for any debt contracted by the debtor subsequently to the date of his so having notice. He cannot therefore set off any debt contracted with notice of the presentation of an insolvency petition (sec. 47). There are no such provisions in the Provincial Insolvency Act. Under that Act, a person, though he has notice of the presentation of an insolvency petition, may prove for a debt contracted by the debtor subsequently to the date of his so having notice, and he may also set off a debt contracted with such notice.

7. *Priority of debts.*

479. Priority of debts [P.-t. I. A., s. 49 ; Prov. I. A., s. 61].—In distributing the property of the insolvent there are certain debts, which as between themselves rank equally, but are entitled to priority over other debts of the insolvent. These are as follows :—

(a) *Debts due to the Crown or to any local authority.*—Debts due to the Crown or to any local authority belong to the class of preferential debts. The expression "local authority" is defined in the General Clauses Act, 1897,

(g) *Ex parte Griffin* (1880) 14 Ch. D. 37 ;
Re Drummond (1909) 2 K. B. 622 ;

Re Bassett (1896) 1 Q. B. 219.

(h) *Re A Debtor* (1907) 2 K. B. 896.

(i) *Re Daintrey* (1900) 1 Q. B. 546.

(j) B. A., (1914) s. 30 (2).

(k) B. A., (1914) s. 31.

Para. 479 sec. 3 (28), as meaning a municipal committee, district board, body of port commissioners, or other authority legally entitled to or entrusted by the Government with the control or management of a municipal or local fund. As to Crown debts, see para. 414 above.

(b) *Salary or wages of clerk, servant or labourer*.—Next among the preferred debts are, under the Presidency-towns Insolvency Act, the salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition, not exceeding Rs. 300 for each such clerk, and Rs. 100 for each such servant or labourer; and under the Provincial Insolvency Act, the salary or wages, not exceeding Rs. 20 in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition. A clerk paid partly by salary and partly by commission is within the section (i). The wages of a labourer may be payable either for time or for piece-work.

(c) *Rent*.—Under the Presidency-towns Insolvency Act rent due to a landlord from the insolvent, not exceeding one month's rent, is also amongst the preferential debts. It is not so under the Provincial Insolvency Act.

The section deals with preferential payments to be made by the Official Assignee or Receiver out of the *assets* of the insolvent in his hands. It does not affect persons holding security and not claiming in the insolvency (m).

The debts mentioned above rank equally between themselves and are to be paid in full, unless the assets are insufficient to meet them in which case they abate in equal proportions between themselves. They must also be paid immediately, subject only to the retention by the Official Assignee or Receiver of such sums as may be necessary for the expenses of administration or otherwise.

After the preferential debts have been paid in full, all debts entered in the schedule are to be paid rateably according to the amounts of such debts

- (l) *Re Klein* (1906) 22 T. L. R. 684. In *Ex parte Hickin* (1850) 19 L.J. Bank. 8, it was held that commission could not be the subject of preferential payment. To remove all doubt it was provided by the B. A., 1926, s. 2, that the priority given by s. 33 of the B.A., 1914, to the wages or salary of a clerk or servant applies to wages or salary whether or not earned wholly or in part by way of commission.

(m) *Bank of Upper India v. Admini-*

strator-General of Bengal (1918) 45 Cal. 653, 47 I. C. 529. See also *Ibrahim Khan v. Rangasami* (1905) 28 Mad. 420, and *Dost Muhammad Khan v. Mani Ram* (1907) 29 All. 537. In *Bank of Upper India v. Administrator-General of Bengal*, the mortgage was an English mortgage, and it was held that the first mortgagee was entitled to priority over the Crown, but that the second mortgagee was not. It is difficult to support the distinction.

respectively and without any preference. If there is any surplus after payment of all the debts mentioned above, it must be applied in payment of interest from the date of the order of adjudication at the rate of six per cent. per annum (n), under the Presidency-towns Insolvency Act, on all debts proved in the insolvency (o), and under the Provincial Insolvency Act, on all debts entered in the schedule of creditors as provided by sec. 33 of that Act.

480. Administration of estates of partners [P.-t. I. A., s. 49 (4); Prov. I. A., s. 61(4)].—The general rule is that in the insolvency of partners, the partnership property is applicable in the first instance in payment of the partnership debts, and the separate estate of each partner is applicable in the first instance in payment of his separate debts. If there is a surplus from the separate estates of the partners, it is to be dealt with as part of the partnership property; and if there is a surplus of the partnership property, it is to be dealt with as part of the respective separate estates in proportion to the interest of each partner in the partnership property.

The above rule as to priorities in the case of joint and separate debts is subject to the following exceptions:—

1. Joint creditors may prove against the separate estates of the partners in competition with the separate creditors if there is no joint estate and no solvent partner (p).

2. Where a joint creditor is the petitioning creditor in respect of a joint debt against one partner, he may prove in competition with the separate creditors of that partner (q), and this is so even where that partner owes him a separate debt which was sufficient to have supported the petition (r).

3. Where the separate property of a partner has been fraudulently converted by his co-partners to the use of the partnership, the separate estate may prove against the joint estate in competition with the joint creditors; and where property belonging to the partnership has been fraudulently converted by a partner to his own use, the creditors of the firm are entitled to prove against the separate estate in competition with the separate creditors (s).

4. Where a member of a firm carries on a distinct and separate trade, and a debt becomes due to the firm in the ordinary course of business between the member and the firm, the firm may prove against the estate of such

(n) But not more: *Ganga Sahai v. Mukarram Ali Khan* (1926) 24 All. L.J. 441, 97 I. C. 556, ('26) A. A. 361.

(o) *Re Mahomed Mahmud Shah* (1896) 13 Cal. 66.

(p) *Re Carpenter* (1890) 7 Morr. 270; *Re Budgett* (1894) 2 Ch. 557.

(q) *Ex parte Ackerman* (1808) 14 Ves. 604 33 E.R. 653.

(r) *Ex parte Burnett* (1841) 2 M. D. & D. 357.

(s) *Ex parte Sillitoe* (1824) 1 Gl. and J. 374; *Read v. Bailey* (1877) 3 App. Cas. 94.

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member in competition with the separate creditors; and if a debt becomes due from the firm to such member, he may prove against the joint estate in competition with the joint creditors (t).

481. Proof in respect of distinct contracts.—Under the English law, if a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as a member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, does not prevent proof against the property of the firm, or of each of the firms, and the property also of the individual partner in respect of contracts on which they are respectively liable (u). Thus where a joint and several promissory note was signed by a firm and also by two members of the firm, it was held that the holder of the note was entitled to prove against, and receive dividends from, both the estates, that is, the estate of the firm and the separate estates of the two partners. The rule was first introduced by sec. 37 of the Bankruptcy Act, 1869, which abolished the bankruptcy doctrine of election in the case of contracts which prevailed before the rule (v). There being no such rule in the Indian Acts, the old doctrine of election will probably apply, and the creditor will not be entitled to prove against, and receive dividends from, both the estate of the firm and the separate estates of the partners. He will have to elect whether he would prove against the joint estate or against the separate estates. A creditor who does not know that he has the right to elect does not lose the right merely because he has proved against, and received dividends from, one estate; he may change his election on refunding the dividends which he has received, with interest, though he cannot disturb any dividends already paid. He cannot, however, change his election after he has made a deliberate and conclusive election (w).

The rule of English law stated above does not apply unless there are two distinct estates. Thus where two persons named Hooper carried on business in partnership in England under the name of Hooper & Sons and in Portugal under the name of Hooper Brothers, and they were adjudged bankrupt by the London Bankruptcy Court, and subsequently also by the Commercial Tribunal of Oporto, it was held that a creditor who, as holder of bills drawn by the Portuguese firm upon and accepted by the London firm had received a dividend in the Portuguese bankruptcy, was not entitled to prove against the estate in England except on

(t) *Ex parte Maude* (1867) L. R. 2 Ch. App. 550; *Ex parte Sillitoe* (1824) 1 Gl. & J. 374.

(u) B. A., 1914, Sch. II, r. 19.

(v) *Ex parte Honey* (1871) L. R. 7 Ch.

App. 178.

(w) *Ex parte Adamson* (1878) 8 Ch. D. 807; *Ahmed Haji v. Mackenzie Stuart & Co.* (1928) 105 I. C. 366, ('28) A. S. 40.

the terms of his accounting for what he had received under the Portuguese bankruptcy (x).

Paras.
481-483

482. Proof by a partner against a partner.—The general rule is that neither a partner, nor a retired partner, nor the representative of a deceased partner, can prove in the insolvency of the continuing or surviving partner in competition with the joint creditors of the firm of which the partner, or retired or deceased partner was a member. This rule does not apply unless there is actually proved in the insolvency some debt in respect of which the insolvent and the retired or deceased partner were jointly liable. The mere possibility that such debts may be proved is not sufficient to introduce the application of the rule (y). The existence of debts which, though provable against the estate of the insolvent partner, are barred by limitation as against the retired or deceased partner, will not preclude the latter from proving. Thus if one of three partners retires from the firm, and he subsequently advances money to the firm, and the other two partners continue the business and become insolvent, and there are at that time creditors of the old firm still unpaid, the retired partner is entitled to prove in competition with the joint creditors, if their claim in respect of the joint debts is barred as against him, even though it may be provable as against the joint estate of the other partners (z).

483. Distress for rent due before adjudication [P.-t.I.A., s. 50].—After an order of adjudication has been made no distress for rent due before such order can be made upon the goods or effects of the insolvent, unless the order be annulled, but the landlord or party to whom the rent may be due will be entitled to prove in respect of such rent. There is no such section in the Provincial Insolvency Act.

(x) *Banco de Portugal v. Wadell* (1880)
5 App. Cas. 161.
(y) *Ex parte Andrews* (1884) 25 Ch.

D. 505.
(z) *Re Hepburn* (1885) 14 Q. B. D. 394.

LECTURE VIII.

PROPERTY OF THE INSOLVENT.

**Paras.
484-486**

484. Property of the insolvent.—On the making of an order of adjudication the “property of the insolvent” vests in the Official Assignee or Receiver for the benefit of his creditors and becomes divisible amongst them. The expression “property of the insolvent” in both the Acts means such of the insolvent’s property as is divisible amongst his creditors. This subject falls to be considered under two heads, namely, property which is divisible amongst the creditors and property which is not so divisible. The relevant sections are sec. 52 of the Presidency-towns Insolvency Act, and sec. 28 of the Provincial Insolvency Act.

485. Insolvent’s property under the Presidency-towns Insolvency Act (s. 52).—Under the Presidency-towns Insolvency Act the property which is not divisible amongst the creditors of the insolvent comprises the following particulars, namely ;—

- (i) property held by the insolvent on trust for any other person ;
- (ii) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessities as aforesaid, not exceeding Rs. 300 in the whole.

The property which is divisible amongst the insolvent’s creditors includes—

- (a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge ;
- (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge ; and
- (c) goods in the possession, order or disposition of the insolvent.

486. Insolvent’s property under the Provincial Insolvency Act (s. 28).—Under the Provincial Insolvency Act, property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force, from liability to attachment and sale in execution of a decree, is not divisible amongst the insolvent’s creditors. Except property which is so exempted all property which may belong to or be vested in the insolvent at the date of the presentation of the petition is divisible amongst his creditors. Property

which may be acquired by or may devolve on the insolvent after the date of the order of adjudication and before his discharge vests forthwith in the Receiver and is also divisible amongst his creditors. Goods in the order and disposition of the insolvent at the date of the presentation of the petition are to be deemed to be the property of the insolvent and they are divisible amongst his creditors. **Para. 486**

In respect of property which is divisible amongst the creditors of the insolvent there are three points of difference between the two Acts, namely;—

- (1) Under the Presidency-towns Insolvency Act property acquired by or devolving on the insolvent after the date of the order of adjudication does not vest in the Official Assignee until he intervenes and claims the property. Under the Provincial Insolvency Act it vests in the Receiver as from the date of the acquisition or devolution.
- (2) Under the Presidency-towns Insolvency Act the title of the Official Assignee relates back to the first available act of insolvency. Under the Provincial Insolvency Act it relates back only to the date of the presentation of the petition.
- (3) Under the Presidency-towns Insolvency Act the reputed ownership clause applies *inter alia* to secured creditors; under the Provincial Insolvency Act, it does not apply to secured creditors.

These points of difference will be considered in their proper place. As to property not divisible amongst the creditors there is no substantial difference between the two Acts. This class of property may be considered first.

I. PROPERTY NOT DIVISIBLE AMONG CREDITORS.

Property which is not divisible among the creditors of the insolvent falls into two classes, namely :—

1. Property held by the insolvent on trust for any other person ; and
2. Tools of trade, apparel and other similar property.

1. Property held by Insolvent as Trustee.

Paras. 487, 488 487. Property held on trust [P.-t. I. A., s. 52 (1) (a) ; Prov. I. A., s. 28 (5)].—Property held by the insolvent on trust for others is not divisible among his creditors and therefore does not pass to the Official Assignee or Receiver. The insolvent has no beneficial interest in such property nor any disposing power over it which he may exercise for his own benefit. It was accordingly held both in England (a) and India (b), even before the enactment of the special provision as to trust property, that property held by the insolvent on trust for others was not divisible among his creditors.

488. Persons holding property in fiduciary capacity.—The rule that property held by the insolvent on trust for others does not pass to the Official Assignee or Receiver applies not only to property held by the insolvent as a trustee in the strict sense of the term, but to property held by him as executor or administrator (c), or in any fiduciary capacity (d). Thus property in the possession of an insolvent as a bailee (e), factor (f), solicitor (g), broker (h), auctioneer (i), or cashier (j), is property held by him in a fiduciary capacity, and if he is adjudged insolvent, it will belong to the principal, and will not pass to the Official Assignee. The position is the same in respect of money held by an agent to collect and remit (k) or by a secretary or treasurer of a society (l). The delivery by a debtor of halves of currency notes to his creditor

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| <p>(a) <i>Winch v. Keeley</i> (1787) 1 T. R. 619, 99 E. R. 1284. The English Acts prior to the Bankruptcy Act, 1869, did not contain any express provision as to trust property.</p> <p>(b) <i>Re Vardalaca Charri</i> (1877) 2 Mad. 15. The I.I.A., 1848, did not contain any express provision as to trust property.</p> <p>(c) <i>Ludlow v. Browning</i> (1708) 11 Mod. 138, 88 E. R. 950.</p> <p>(d) <i>In the matter of Syed Kazim</i> (1927) 5 Rang. 73, 76, 102 I.C. 389, ('27) A.R. 140 ; <i>New Zealand and Australian Land Co. v. Watson</i> (1881) 7 Q. B. D. 374, 383.</p> | <p>(e) <i>Re Hallett's Estate</i> (1879) 13 Ch. D. 696, 710-711.</p> <p>(f) <i>Taylor v. Plumer</i> (1815) 3 M. & S. 562, 105 E.R. 721.</p> <p>(g) <i>Re Hallett's Estate</i> (1879) 13 Ch. D. 696.</p> <p>(h) <i>Ex parte Cooke</i> (1876) 4 Ch. D. 123.</p> <p>(i) <i>Re Cotton</i> (1913) 108 L. T. 310.</p> <p>(j) <i>Re Hulton</i> (1891) 8 Mor. 69.</p> <p>(k) See para. 495 below; <i>Alliance Bank of Simla v. Amritsar Bank</i> (1915) Punj. Rec. No. 79, p. 322, at p. 324, 31 I.C. 215.</p> <p>(l) <i>Ramsay & Co. v. The Official Assignee of Madras</i> (1912) 35 Mad. 712, 11 I.C. 769.</p> |
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though it be with the intention of paying off the debt by a further remittance of the other halves, does not pass the property in the notes to the creditor so as to entitle him to claim delivery of the other halves. The debtor does not by simply sending the first halves become a trustee or bailee in respect of the other halves of the notes (m).

Paras.
488, 489

489. Right to follow trust property.—(1) Where a trustee, which expression includes a person occupying a fiduciary position (n), has disposed of trust property, and the money constituting the proceeds thereof can be traced in his hands (o), the beneficiary is entitled to follow it, although it may have been mixed by the trustee with money of his own and can no longer be identified. The reason is that equity could follow the money even if put into a bag or into an undistinguishable mass, by taking out the same quantity (p). The same is the rule of the Indian law (q).

(2) If a trustee wrongfully mixes the trust property or the proceeds thereof with his own, the beneficiary is entitled to a charge on the whole of the mixed fund for the amount due to him (r).

(3) It follows from the above propositions that if money held by a person as a trustee has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands. It was so held in *Re Hallett's Estate* (s), which is the leading case on the subject of following trust property.

(4) If a person who holds money as a trustee pays it to his account at his banker's and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's case* (t) attributing the first drawings out to the first payments in does not apply, and the drawer must be taken to have drawn out his own money in preference to the trust money (u). "He would in the absence of any evidence that he intended a wrong be deemed to have intended and done what was right, and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible" (v). In any event the

(m) *Smith v. Mundy* (1860) 29 L. J. Q. B. 172; *Koti Venkata Ramiah v. Official Assignee of Madras* (1910) 33 Mad. 196, 5 I.C. 202.

(n) *Re Hallett's Estate* (1879) 13 Ch. D. 696, 720.

(o) The trust fund can always be traced so long as it has not been dissipated, annihilated or destroyed; *Frith v. Carland* (1865) 34 L. J. Ch. 301, 304; *Re Hallett's Estate* (1879) 13 Ch. D. 696, 719.

(p) *Re Hallett's Estate* (1879) 13 Ch. D. 696, 718.

(q) Indian Trusts Act, 1882, s. 63.

(r) Indian Trusts Act, 1882, s. 66;

Official Assignee of Madras v. Devakottah (1929) 57 Mad. L. J. 99.

(s) (1879) 13 Ch. D. 696, *supra*.

(t) (1816) 1 Mer. 572, 35 E.R. 781. See Indian Contract Act, 1872, ss. 59, 60.

(u) *Re Hallett's Estate* (1879) 13 Ch. D. 696; *Ramsay & Co. v. The Official Assignee of Madras* (1912) 35 Mad. 712, 11 I.C. 769.

(v) *Pennell v. Deffel* (1853) 4 De G. M. & G. 372, at p. 382, 43 E. R. 551, at p. 556, per Lord Justice Knight Bruce, (1854) 23 L. J. Ch. 115.

Paras.
489, 490

trustee would be estopped from alleging that he drew out the trust money, and not his own, and this estoppel binds the Official Assignee (*w*).

(5) The right to follow the money can only arise where the intermixture of it by a person occupying a fiduciary position with his own moneys was *wrongful*. Where in a particular class of business the relation between the parties which was originally that of trustee and cestui que trust is transformed at a later stage into that of a debtor and creditor, the intermixture is *lawful*, and the right to follow the money does not exist. Thus a factor entrusted with the sale of goods may keep the proceeds separate, or he may mix them with his own moneys. Such intermixture is not wrongful, for according to the usage of trade between merchants and factors, the factor may blend the proceeds with his own moneys, in which case the proceeds lose their trust character and the relation of debtor and creditor is established between the parties. The result is that if the factor becomes insolvent, and the goods are still with him, the principal, and not the Official Assignee or Receiver, is entitled to receive the goods. If the goods are sold, but the price is not yet paid, the principal again is entitled to recover the price. If the price is paid, and it is kept separate or is invested in other goods, the principal, and not the Official Assignee or Receiver, is entitled to the money or the goods. But if the price has been *mized* by the factor with his own moneys, the principal cannot follow it, the intermixture not being wrongful, and it goes to the Official Assignee or Receiver. After intermixture, the price loses its trust character, and what would otherwise have been trust money is transformed into a simple debt (*x*).

Where a claim is made to follow money, the first thing to ascertain is the relationship between the insolvent and the claimant at the date of the order of adjudication. If the insolvent was merely a debtor of the claimant, the right to follow money does not exist. See para. 496 "Factor."

490. Beneficial interest of trustee.—Where the insolvent himself has any beneficial interest, as where he holds the property on trust for himself and other persons, such interest passes to the Official Assignee or Receiver as his property, and it is divisible among his creditors (*y*). The right of a trustee to be indemnified out of the trust property is a beneficial interest within the meaning of this rule, and it passes to the Official Assignee as part of his property (*z*). But the Official Assignee can only avail himself of the right of indemnity for the purpose of discharging the liability in respect of which the right arises (*a*).

(*w*) *Harris v. Truman & Co.* (1882) 9 Q. B. D. 264.

(*x*) *Re Hallett's Estate* (1879) 13 Ch. D. 696, 723-724, and the cases cited in para. 496, "Factor."

(*y*) *St. Thomas's Hospital v. Richardson* (1910) 1 K. B. 271, 278, 279; *Ex parte Butler* (1749) 1 Atk. 210,

at p. 213, 26 E. R. 136, at p. 138.

(*z*) *Jennings v. Mather* (1902) 1 K. B. 1; (1910) 1 K. B. 271, *supra*; *Dowse v. Gorton* (1891) A. C. 190 [executor's right of indemnity]. As to trustee's right of indemnity, see Indian Trusts Act, 1882, s. 32. (*a*) *Re Richardson* (1911) 2 K. B. 705.

491. Trust property and reputed ownership.—Property held by an insolvent on trust for others does not pass to the Official Assignee under the reputed ownership clause, unless the beneficiaries have consented to its being dealt with by him in a manner inconsistent with the provisions of the trust. This is dealt with in Lecture IX.

**Paras.
491, 492**

492. Specific appropriation.—An appropriation of a debt, fund or goods, may amount to an equitable assignment so as to entitle the assignee, on the insolvency of the assignor, to have his claim satisfied out of the subject-matter of the assignment. A person may assign his beneficial or equitable interest in a property owned by him. The assignment of such an interest is called an equitable assignment, and the assignor is deemed to be a *trustee* for the assignee (b). The only distinction between the English and the Indian law on the subject is that an assignment of an actionable claim must under the Indian law be in writing signed by the assignor [see sub-para. (11)].

(1) *Agreement to pay debt out of a specific fund.*—An agreement between a debtor and a creditor that the debt owing shall be paid out of a *specific* fund or out of *specific* goods will operate as an equitable assignment of the fund or goods (c). Thus where a person who was indebted to a bank agreed with the bank manager to assign to the bank his interest in certain goods, then deposited with a third party for sale, it was held that there was a complete equitable assignment of the goods to the bank (d).

(2) *Agreement by debtor to apply a fund in a particular way.*—A mere agreement that a fund shall be applied in a particular way does not amount to an equitable assignment. Thus an agreement by A to apply money to be advanced to him by B in the purchase of goods, to sell those goods, and to pay the proceeds of the sale into B's bank, account does not amount to an equitable assignment either of the goods or of the proceeds, and B will not be entitled, on A's insolvency to a charge either on the goods or on the proceeds of goods in the hands of A at the time of insolvency (e).

(3) *Promise to pay debt out of money when received.*—A promise by a debtor to his creditor to pay the debt when the debtor receives money due to him from a third person does not constitute an equitable assignment, so as to charge the debt in the hands of the third person (f).

(b) As to what constitutes a valid equitable assignment, see *Brandt's Sons & Co. v. Dunlop Rubber Co.* (1905) A. C. 454, at p. 462; *Palmer v. Carey* (1926) A. C. 703, at p. 706.
(c) *Rodick v. Gandel* (1852) 1 De

G. M. & G. 763, 777-778, 42 E. R. 749, 754.
(d) *London and Yorkshire Bank v. White* (1895) 11 T. L. R. 570.
(e) *Palmer v. Carey* (1926) A. C. 703.
(f) *Field v. Megaw* (1869) L. R. 4 C. P. 660.

Para. 492 (4) *Representation that moneys are available for payment of debt.*—

A mere representation by the drawer that bills of exchange drawn upon *A. B.* will be paid, because the drawer has previously remitted to *A. B.* funds to a much larger amount, does not amount to an equitable assignment of the funds in the hands of *A. B.* (g).

(5) *Order by debtor to creditor upon debtor's debtor.*—An order given by a debtor *D*, to his creditor *C*, upon *X* who owes money to *D* or holds a fund belonging to *D*, directing *X* to pay the money or the fund to *C*, creates a valid equitable charge upon such money or fund; in other words, it operates as an equitable assignment of the debt or fund to which the order refers (h). The assent of the party to whom the order is given (that is, *X*) is not necessary to constitute the assignment (i). But the order must be upon the debtor or upon the person holding funds of the giver of the order (that is, upon *X*). A letter addressed by a person to the solicitors of his debtor authorising them to receive the money due to him from the debtor and requesting them to pay it to his creditor, does not amount to an equitable assignment, though the solicitors may promise the creditor to pay the money to him on receiving it (j). The order to amount to an equitable assignment must specify the fund out of which the payment is to be made. An order in these terms, "Please pay *P* the amount of his account, Rs. 5,000, for goods supplied," is not an equitable assignment (k). If the order specifies the debt or fund, and is addressed to the debtor or to the holder of the fund, the order is irrevocable; it cannot be revoked by the person giving it (l), nor is it revoked by his subsequent insolvency (m).

(6) *Notice of assignment.*—An equitable assignment of a debt or fund is complete as between the assignor and assignee, though no notice of the assignment is given either by the assignor or the assignee to the debtor or the holder of the fund (n). Though no such notice is necessary to complete the assignment, it is in the interest of the assignee to give notice of the assignment to the debtor or the holder of the fund (1) to prevent the debtor from paying the assignor, (2) to prevent a subsequent assignee from gaining priority by giving notice (o), and (3) to prevent the operation of the reputed ownership clause where the debt assigned is a trade debt (p).

(g) *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873) L. R. 6 H. L. 352; *Thomson v. Simpson* (1870) L. R. 5 Ch. App. 659.

(h) *Rodick v. Gandel* 1 De G. M. & G. 763, 777-778, 42 E. R. 749, 754.

(i) *Ex parte South* (1818) 3 Swans. 392, 36 E. R. 907; *Morrell v. Wootten* (1852) 16 Beav. 197, 51 E. R. 753.

(j) *Rodick v. Gandel* 1 De G. M. & G. 763, 778, 42 E. R. 749, 755.

(k) *Percival v. Dunn* (1885) 29 Ch. D.

128.

(l) *Fisher v. Miller* (1823) 1 Bing. 150, 130 E. R. 61.

(m) *Alexander v. Steinhardt, Walker & Co.* (1903) 2 K. B. 208.

(n) *Carvalho v. Burn* (1833) 4 My. and Cr. 690, 41 E. R. 265; *Alexander v. Steinhardt, Walker & Co.* (1903) 2 K. B. 208.

(o) *Dearle v. Hall* (1823) 3 Russ. 1, 38 E. R. 475; *Marchant v. Morton, Down & Co.* (1901) 2 K. B. 829.

(p) See Lecture IX.

(7) *Order on agent to pay.*—We have already considered the case **Para. 492** of an equitable assignment constituted by an *order given by a debtor to his creditor to receive* a sum of money out of a particular fund due to him in the hands of a third party. This class of cases must be distinguished from another class where a debtor *D*, who owes money to *C*, and has a fund belonging to him in the hands of a third party *X*, directs *X* to pay it to *C*. In that case, if the holder of the fund *X* consents to pay the fund to *C*, and the direction is communicated to the creditor *C*, the assignment is complete, and *C* can enforce the payment of the money, but it is necessary that the direction should be communicated to *C* (*q*). If the direction is communicated to *C*, it amounts to an equitable assignment, and is irrevocable (*r*). If it is not so communicated, it amounts to no more than a mandate from a principal to his agent, which can give no right or interest to the creditor in the subject of the mandate. It may be revoked at any time before it is executed (*s*), and it is also revoked by insolvency (*t*). The consent of the person to whom the communication is made, that is, *C*, to the appropriation, will be presumed in the absence of evidence to the contrary, the appropriation being for his advantage (*u*).

(8) *Cheque not an equitable assignment of drawer's balance at bankers.*—A cheque is not an equitable assignment of the drawer's balance at the bankers upon whom it is drawn. A banker who dishonours a cheque is liable to his customer, and not to the holder, and the holder has no remedy against him either in law or in equity (*v*).

(9) *Assignment in fraud of bankruptcy laws.*—An equitable assignment to be effective as against the Official Assignee or Receiver, must not be in fraud of the bankruptcy laws, *e.g.*, it must not amount to a fraudulent preference (*w*).

(10) *Trust in favour of creditors.*—A mere transfer by a debtor of his property in favour of his creditors does not create a trust for the benefit of the creditors. The transfer is revocable by him unless it is *communicated* to one or more of the creditors (*x*).

(11) *Distinction between the English and the Indian law.*—According to the English law, a writing is not necessary to constitute an equitable assignment either of goods or of choses in action. A chose in action is called an actionable claim in India. An actionable claim is defined in the Transfer of Property Act, 1882, sec. 3, as a claim to any

(*q*) *Morrell v. Wootten* (1852) 16 Beav. 197, 202-203, 51 E. R. 753, 755.
 (*r*) *Hodgson v. Anderson* (1825) 5 B. & C. 842, 107 E. R. 945; *Ranken v. Alfaro* (1877) 5 Ch. D. 786.
 (*s*) *Scott v. Porcher* (1817) 3 Mer. 652, 664, 36 E. R. 250, 255.
 (*t*) *Ex parte Hall* (1878) 10 Ch. D. 615.

(*u*) *Siggers v. Evans* (1855) 25 L. J. Q. B. 305.
 (*v*) *Hopkinson v. Forster* (1874) L. R. 19 Eq. 74.
 (*w*) P.-t. I. Act, s. 56; Prov. I. Act, s. 54.
 (*x*) See Indian Trusts Act, 1882, s. 78 (*o*); *Ellis & Co. v. Cross* (1915) 2 K. B. 654.

Para. 492 debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property, not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds of relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. By sec. 130 of that Act it is enacted that the transfer of an actionable claim, whether such transfer be absolute or by way of charge (y), shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor shall vest in the transferee whether notice of the transfer is given or not. If the assignment is not in writing signed by the transferor, it is void, and of no effect (z). An assignment of the proceeds of goods where the goods are not in the actual or constructive possession of the assignor is an assignment of an actionable claim, and it must be in writing signed by the assignor. But goods in the possession of an agent or servant of the assignor are in the constructive possession of the assignor, and the assignment of the sale proceeds of such goods does not require to be in writing. Except as to the requirements of a writing, there is no distinction, it is conceived, between the English and the Indian law on the subject of equitable assignments.

(12) *Rule in Ex parte Waring*.—It is necessary, to constitute an equitable assignment, that there must be privity, either by contract or estoppel, between the assignor and assignee. To this rule there is an exception established by the case of *Ex parte Waring* (a) in which it was decided that, where, as between the drawer and acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill (b). This is so not because the holder of the bill is the assignee of the security, but in order to work out the equities between two insolvent estates. "The principle of *Ex parte Waring* applies where there are equities to adjust between two parties who become insolvent, and the adjustment of which equities, by a piece of good luck, so far as a third party is concerned, operates for the benefit of such third party" (c).

- (y) *Mulraj Khata v. Vishvanath* (1913) 40 I. A. 24, 37 Bom. 198, 17 I. C. 627.
 (z) See 40 I. A. 24, 37 Bom. 198, 17 I. C. 627, *supra*.
 (a) (1815) 19 Ves. 345, 34 E. R. 546; *City Bank v. Luckie* (1870) L. R.

- 5 Ch. App. 773 [security given to secure balance of cash account].
 (b) *Ex parte Dever* (no. 2) (1885) 14 Q. B. D. 611, at p. 620.
 (c) *Vaughan v. Halliday* (1874) L. R. 9 Ch. App. 561, at p. 567, per James, L.J.

In order that the rule should apply it is necessary that—

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- (1) there should be a double insolvency, that is to say, both drawer and acceptor must be insolvent (*d*), and both the estates must be under a forced administration (*e*); it is not necessary that there should be judicial insolvencies (*f*);
- (2) there should be a right of double proof, that is to say, a right to prove against both estates. If the drawee to whom the securities are remitted refuses to accept the bill, the holder of the bill is not entitled to have the securities applied in payment of the bill (*g*). If either the drawer or the acceptor is solvent, the bill-holder gets paid in full, in which case no question arises as to the securities. If the drawer is solvent and pays, the securities must be restored to him. If the acceptor is solvent and pays, he is entitled to realise the securities and to indemnify himself out of the proceeds (*h*); and
- (3) there should be a specific appropriation of the securities to meet the bill (*i*).

If the above conditions are satisfied, the holder of the bill is entitled to have the securities applied in payment of the bill. But the securities must be *in specie* at the date of insolvency, and must not have been realised by the acceptor before insolvency (*j*). If the securities are not sufficient to pay the amount of the bills in full, the holder of the bill is entitled to prove for the balance against the estates of the drawer and the acceptor *pari passu* with the other creditors (*k*). If he has proved for the full amount, and the securities are realised after proof, the proof must be reduced by the amount received by him from the securities, and any dividends received on the excess of the original over the reduced proof must be refunded, because the securities are to be considered as having been applied in the first instance (*l*). In *Royal Bank of Scotland v. The Commercial Bank of Scotland* (*m*), Lord Selborne expressed the opinion that the rule in *Ex parte Waring*, when applied to a case where the security was insufficient, conferred

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| <p>(d) <i>Powles v. Hargreaves</i> (1853) 3 De G. M. & G. 430, 450, 43 E.R. 169, 176; <i>Vaughan v. Halliday</i> (1874) L. R. 9 Ch. App. 561, 568; <i>Re New Zealand Banking Corporation</i> (1867) L. R. 4 Eq. 226 [company ordered to be wound up, but not shown to be insolvent].</p> <p>(e) <i>Ex parte Gomez</i> (1875) L. R. 10 Ch. App. 639, 648.</p> <p>(f) 3 De G. M. & G. 430, 43 E. R. 169, <i>supra</i>; <i>Ex parte Alliance Bank</i> (1869) L. R. 4 Ch. App. 423; <i>Ex parte General South African Co.</i> (1875) L. R. 10 Ch. App. 635</p> | <p>[estate not under judicial administration].</p> <p>(g) <i>Vaughan v. Halliday</i> (1874) L. R. 9 Ch. App. 561.</p> <p>(h) <i>Powles v. Hargreaves</i> (1852) 3 De G. M. & G. 430, 450-451, 43 E. R. 169, 176.</p> <p>(i) <i>Ex parte Banner</i> (1876) 2 Ch. D. 278.</p> <p>(j) <i>Ex parte Dever</i> (no. 2) (1885) 14 Q. B. D. 611.</p> <p>(k) <i>City Bank v. Luckie</i> (1870) L.R. 5 Ch. App. 773, 778.</p> <p>(l) <i>Re Barnard's Banking Company</i> (1875) L. R. 10 Ch. App. 198.</p> <p>(m) (1882) 7 App. Cas. 366.</p> |
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Para. 492 a benefit upon the bill-holder at the expense of the acceptor, and that the reasons given by Lord Cranworth in *Powles v. Hargreaves* (n), to justify its extension to the case of a deficient security, were not satisfactory. The only question, however, in that case was whether the rule in *Ex parte Waring* applied to an administration of insolvent estates in Scotland, and it was held that it did not. Both the rule and its extension have been established firmly, and it is unlikely that the application of the rule will be excluded where the security is insufficient.

It is no objection to the application of the rule in *Ex parte Waring* that the depositor of the security was not a party to the bill as drawer or indorser, provided the bill was drawn in respect of a transaction in which he is liable. Thus where according to the course of dealings between the parties the seller drew bills payable to himself upon a third person, and the third person accepted the bills for the accommodation of the buyer, and the buyer deposited with the third person securities for the specific purpose of meeting the bills, the seller who was the drawer and the holder of the bills was held entitled on the insolvency both of the buyer and the acceptor to have the securities applied in payment of the bills. The seller, although he was not entitled to prove on the bills both against the buyer and the acceptor, was entitled to prove on the bills against the acceptor; also he was entitled to prove for the same debt against the buyer for goods sold and delivered. There being, therefore, a double insolvency and a double right of proof, the principle of *Ex parte Waring* was held to apply (o).

In the case of two firms engaged in a common adventure, the principle of *Ex parte Waring* will be applied subject to the right of the joint creditors of the aggregate firms to be paid their debts out of the aggregate estate. Thus where two firms, one in Bombay and the other in London, engaged in a joint adventure for buying and selling goods, and the Bombay firm bought goods on joint account and paid for them with the proceeds of bills drawn by it on the London firm and discounted in Bombay, and the goods so bought were consigned to London for sale, it was held on the insolvency of the two firms that the bill-holders were entitled to have the goods applied in payment of the bills, but subject to the right of the joint creditors to have the goods applied to the payment of their debts (p).

(n) (1853) 3 De G. M. & G. 430, 43 E. R. 169. The order as drawn up in *Ex parte Waring* provided for the case of the securities being equal or more than sufficient or being insufficient, and, if insufficient, the parties holding the acceptances were to prove for the deficiency. The securities in that case proved to be more than sufficient. *Powles*

v. Hargreaves expressly decided that the rule applied also where the security was insufficient.

(o) *Ex parte Smart* (1872) L.R. 8 Ch. App. 220, explained in *Vaughan v. Halliday* (1874) L.R. 9 Ch. App. 561 at p. 568, per Mellish, L.J.
(p) *Ex parte Dewhurst* (1873) L.R. 8 Ch. App. 965.

493. Property held by insolvent for specific purpose.—

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Property which is in the possession of an insolvent at the time of his insolvency for a specific purpose does not pass to the Official Assignee or Receiver, but is impressed with a trust and is subject to the same principles as trust property (*q*).

Where bills or goods are specifically appropriated to a particular purpose, the person who receives them must either apply them to the purpose for which they were sent, or return them (*r*). If they are not so applied, the owner will be entitled to have the bills or goods restored to him, if they are still in specie in the insolvent's hands at the time of the insolvency, or the proceeds thereof if the Official Assignee or Receiver has disposed of them after the insolvency. The commonest case is that of the drawer of a bill remitting bills or goods to the acceptor for the specific purpose of meeting the latter's acceptance. In such a case, if the acceptor becomes insolvent, whether before or after the bill becomes due, and the acceptance is dishonoured, the drawer will be entitled to have the remittances or consignments restored to him if they remain in specie in the acceptor's hands at the time of his insolvency, or to the proceeds thereof if the Official Assignee or Receiver disposes of them after the insolvency. The remittances having been specifically appropriated to protect the acceptor from liability on the particular acceptance, they are impressed with a trust and the person entitled to them is the person who remits the bills or goods, and not the Official Assignee or Receiver (*s*).

Whether there has been an appropriation in a particular case depends on the facts of the case, the relation and the course of dealings between the parties, and mercantile usage (*t*). A direction by the consignor to the consignee to place the invoice price of goods to his credit and the bills drawn against them to his debit does not amount to an appropriation of goods to protect the bills (*u*).

494. Money advanced for a specific purpose.—Money lent to a person for the specific purpose of paying his pressing creditors is impressed with a trust for that purpose. It is not the debtor's property, and if it is

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| <p>(<i>q</i>) <i>Ex parte Waring</i> (1815) 19 Ves. 345, 34 E.R. 546; <i>Steele v. Stuart</i> (1866) L.R. 2 Eq. 84; <i>Re Rogers</i> (1891) 8 Mor. 243; <i>Re Drucker</i> (1902) 2 K.B. 237.</p> <p>(<i>r</i>) Such a return is not a fraudulent preference: <i>Ex parte Kelly</i> (1879) 11 Ch. D. 306.</p> <p>(<i>s</i>) <i>Ex parte Dumas</i> (1754) 2 Ves. Sen. 582, 28 E.R. 372; <i>Tooke v. Hollingworth</i> (1793) 5 T.R. 215, 101 E.R. 121; <i>Ex parte Imbert</i></p> | <p>(1857) 1 De G. & J. 152, 44 E.R. 681; <i>Ex parte Broad</i> (1884) 13 Q. B. D. 740; <i>Ex parte Dever</i> (1884) 13 Q.B.D. 766; <i>Ex parte Dever</i> (No. 2) (1885) 14 Q.B. D. 611.</p> <p>(<i>t</i>) 13 Q. B. D. 740, 745, <i>supra</i>; 13 Q. B. D. 766, <i>supra</i>; 14 Q. B. D. 611, <i>supra</i>. As to allowance of interest, see 13 Q. B. D. 740, 746, <i>supra</i>.</p> <p>(<i>u</i>) <i>Ex parte Banner</i> (1876) 2 Ch. D. 278.</p> |
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paid to the creditors, it cannot on his insolvency be recovered from them by the Official Assignee (v).

495. Banker.—Ordinarily money paid by a customer into his current account is in law lent by the customer to the banker. From the moment of payment in, it becomes the property of the banker, and he is entitled to deal with it as his own. Accordingly, so far as concerns money upon a current account, the banker is neither the trustee nor the agent of his customer but only his debtor, liable to repay the loan by honouring the customer's cheques. If the banker becomes insolvent, the customer can only prove in the insolvency and receive a dividend rateably with other creditors (w). Similarly, money paid to a banker as a deposit for a fixed period is lent by the customer to the banker, the banker being liable only to pay back the principal after it has become due with interest at the stipulated rate (x). The relation of debtor and creditor must be taken to continue until it is terminated by payment or by the banker applying the money or taking some step to apply the money as directed by the customer (z). A simple demand for repayment does not transform the banker into a trustee, and if the banker fails before payment, the customer will only have a right of proof for the amount due to him (a).

The ordinary relation between a banker and his customer is, as stated above, that of debtor and creditor, and not of trustee and beneficiary. Where, however, bills or cheques are sent to a banker as an agent for a specific purpose, e.g., to collect and remit, there is a trust, and the bills and cheques or the proceeds do not pass to the Official Assignee or Receiver on the banker's insolvency (b). The question whether bills or cheques sent to a banker are received by him as banker or as agent to collect is a question of fact (c).

- (v) *Re Rogers* (1891) 8 Mor. 243;
Re Drucker (1902) 2 K. B. 237;
Re Watson (1913) 107 L. T. 783; *Re Hooley* (1915) H. B. R. 181.
- (w) *Foley v. Hill* (1848) 2 H. L. C. 28, 9 E. R. 1002; *Re Agra and Masterman's Bank* (1867) 36 L. J. Ch. 151; *Ex parte Lloyd* (1904) 91 L. T. 665.
- (x) *Official Assignee of Madras v. Ramchandra Iyer* (1910) 33 Mad. 134, 139, 141-142, 5 I. C. 974; *Official Assignee of Madras v. Smith* (1909) 32 Mad. 68, 1 I. C. 712.
- (z) 33 Mad. 134, 144, 5 I. C. 974, *supra*.
- (a) 33 Mad. 134, 5 I. C. 974, per Abdur Rahim, J.; *Official Assignee*

- of Madras v. Krishna Bhatta* (1911) 34 Mad. 128, 6 I. C. 213. The contrary view taken by Munroe, J., in 33 Mad. 134, 5 I. C. 974, is erroneous; see 34 Mad. at p. 129, 6 I. C. 213.
- (b) *Parke v. Eliason* (1801) 1 East. 544, 102 E. R. 210; *Re Brown* (1890) 6 Mor. 81; *Re Mills, Bawtree & Co.* (1893) 10 Mor. 193, 211; *Alliance Bank of Simla v. Amritsar Bank* (1915) P. R. No. 79, p. 322, 31 I. C. 215. As to the test to be applied in such cases, see (1893) 10 Mor. 193 at pp. 212-213, *supra*.
- (c) *Re Mills, Bawtree & Co.* (1893) 10 Mor. 193, 211.

When a person pays money into a bank to be applied in a specific manner, and the banker stops payment before taking any step towards applying it to the purpose, the payer cannot recover the money paid, but has merely a right of proof as a general creditor (*d*). It is otherwise where the banker has applied the money as directed (*e*) or has taken some step so to apply it, and has by so doing ceased to be merely a debtor in respect of that money. Mere consent on the part of a banker to apply money standing to the credit of the customer, as directed by the customer, does not convert the relation of debtor and creditor between the banker and the customer into a fiduciary relation (*f*). The High Court of Madras has held that where *A* sends money to a banker with instructions to pay over the same to *B* who has no account with the banker, and the banker writes to *B* stating that he has placed the money to *B*'s credit (*g*), or that he held the money in suspense account pending instructions from *B* (*h*), the banker holds the amount not as a banker, but in a fiduciary capacity.

(1) *Short Bills*.—Short bills, that is, bills not yet due, remitted by a customer to a banker, continue to be the property of the customer in the hands of the banker, and if they are still *in specie* at the date of the banker's insolvency, they do not pass to the Official Assignee or Receiver, but belong to the customer subject to the banker's lien; the reason is that ordinarily such bills are sent to bankers as *agents* for the specific purpose of holding them until due and obtaining payment when due. If, however, there is a contract express or implied between the banker and the customer that such bills shall be treated as immediate cash, they belong to the banker, and they will pass to the Official Assignee or Receiver on the insolvency of the banker. The sole question in all these cases is whether there has been any contract between the parties that under all circumstances and for all purposes the short bills should become the absolute property of the banker. In order to change the property it must be shown that the banker bought the bills, or that he discounted them, which is indeed the same thing, for there would then be a right of action by the customer against the banker for the price which he agreed to give for the bills (*i*). The fact that the banker has credited the amount secured by

- (*d*) *Re Barned's Banking Co.* (1870) 39 L. J. Ch. 635; *Johnson v. Roberts* (1875) L.R. 10 Ch.App. 505.
- (*e*) *Farley v. Turner* (1857) 26 L. J. Ch. 710.
- (*f*) *Official Assignee of Madras v. Lupprian* (1911) 34 Mad. 121, 6 I. C. 387, in appeal from 33 Mad. 145, 5 I. C. 312.
- (*g*) *Official Assignee of Madras v. The Oriental Life Assurance Co.* (1910) 33 Mad. 150, 5 I. C. 200.

- (*h*) *Official Assignee of Madras v. Rajam Ayyar* (1911) 36 Mad. 499, 6 I. C. 383, in appeal from 33 Mad. 299, 8 I. C. 138.
- (*i*) *Thompson v. Giles* (1824) 2 B. & C. 422, 107 E. R. 441; *Ex parte Pease* (1812) 19 Ves. 25, 34 E. R. 428; *Ex parte Sollers* (1811) 18 Ves. 229, 34 E. R. 304; *Giles v. Perkins* (1807) 9 East, 12, 103 E. R. 477. As to banker's lien, see Indian Contract Act, 1872, s. 171.

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the bills to the customer as cash, or that he has allowed the customer to draw on the credit of the bills, does not, in itself, render the bills the absolute property of the banker (*j*). Nor does the fact that the customer has indorsed the bills in favour of the banker (*k*).

The principles applicable to short bills apply not only to bankers, but generally to merchants and others with whom short bills are deposited (*l*). They do not apply to cheques or bills payable on demand, the presumption in their case being that they are remitted as cash (*m*).

(2) *Crossed-cheques*.—Where a customer pays a crossed cheque into his bank, the question whether the bank receive it as holders for value or as agents for collection is a pure question of fact. If the bank receive the cheque as agents for collection and stop payment before the cheque is finally cleared at the clearing house, they can only receive and hold the proceeds as collecting agents for their customer, and not in the ordinary bank relationship of debtor and creditor. It is otherwise if the bank receive the cheque as holders for value so as to entitle the customer to draw for the amount of the cheque on the bank (*n*). If the cheque is cleared *before* insolvency, the relation between the parties as to the amount of the cheque is the ordinary relation of banker and customer.

496. Factor.—A factor or mercantile agent entrusted with goods to sell for his principal is a bailee of the goods. He has a special property in the goods as distinguished from the general property had by a person holding property on an express trust. But though not an express trustee, he holds the goods in a fiduciary capacity, and is a trustee of the goods within the meaning of sec. 52 (1) (a) of the Presidency-towns Insolvency Act.

If the factor is adjudged insolvent, the goods will not pass to the Official Assignee or Receiver, but will remain the property of the principal. If he sells the goods, and becomes insolvent before the purchase-money is received by him, the right to recover the price belongs to the principal. If he sells the goods and receives the purchase-money, and is afterwards adjudged insolvent, such money, if it has been kept separate, will belong to the principal. Similarly, if the money is invested in other goods, the goods will belong to the principal (*o*). If, however, he mixes the purchase-money with his own money, as he is entitled to do, the principal cannot follow it, and the purchase-money will belong to the Official Assignee or

(*j*) *Ex parte Barkworth* (1858) 27 L. J. Bank. 5, 44 E. R. 962; *Giles v. Perkins* (1807) 9 East. 12, 103 E. R. 477.

(*k*) *Ex parte Twogood* (1812) 19 Ves. 229, 34 E. R. 503.

(*l*) *Jombart v. Woollet* (1837) 2 My. & Cr. 389, 40 E. R. 688.

(*m*) *Re Mills, Bawtree & Co.* (1894) 10 Morr. 193, 211-212.

(*n*) *Re Farrow's Bank, Limited* (1923) 1 Ch. 41.

(*o*) *Taylor v. Plumer* (1815) 3 M. & S. 562, 105 E. R. 721; *Ex parte Sayers* (1800) 5 Ves. 169, 31 E. R. 528.

Receiver (p). The reasons why when there is an intermixture, the principal cannot follow the purchase-money, are explained in para. 489 (5) above.

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The lien which a factor has on the goods in his possession (q) passes on his insolvency to the Official Assignee.

When goods are delivered by the owner to a factor for sale, the legal relation between the parties is one of principal and agent. When goods are consigned to a person on condition that he should pay to the consignor a fixed price at a fixed time, the consignee being at liberty to sell them at any price he likes and on any credit that he likes, the consignee is not an agent, but a principal. If he sells the goods, and afterwards becomes insolvent, the purchase-money cannot be followed by the consignor, but will pass to the Official Assignee or Receiver (r).

Goods in the hands of a factor at the time of his insolvency do not pass to the Official Assignee under the reputed ownership clause if the relationship between the parties is a matter of notoriety. This subject is dealt with in Chapter IX.

497. Auctioneer.—An auctioneer entrusted with the sale of goods is a trustee within the meaning of sec. 52 (1)(a) of the Presidency-towns Insolvency Act. He receives the goods for the specific purpose of sale, with the fiduciary obligation to account for the price to his principal and to pay it over. In the absence, therefore, of any usage or any evidence of an agreement by which the principal becomes the creditor of the auctioneer, the purchase-money, if it can be traced, belongs to the principal, and not the Official Assignee or Receiver (s).

498. Commission agent.—Goods entrusted to a person for sale as commission agent do not pass on his insolvency to the Official Assignee or Receiver, but remain the property of the owner. If, however, the agent has sold the goods and realised the money, such money is not trust money and it goes to the Official Assignee or Receiver. The reason is that when a trader gives goods to a commission agent for sale, he relies for payment not on the actual sale proceeds of the goods, but on the general credit of the commission agent (t). If the goods are insured against fire by a commission agent, and they are destroyed by fire, and the commission agent

(p) See *Frith v. Cartland* (1865) 34 L. J. Ch. 301; *Pennell v. Deffell* (1854) 23 L. J. Ch. 115, (1853) 4 De G. M. & G. 372, 43 E. R. 551; *Re Hallett's Estate* (1879) 13 Ch. D. 696, 723-724.
(q) Indian Contract Act, 1872, s. 171.
(r) *John Towle & Co. v. White* (1873)

29 L. T. 78, affirming *Ex parte White* (1870) L. R. 6 Ch. App. 397.
(s) *Re Cotton* (1913) 108 L. T. 310.
(t) *In the matter of Syed Kazim* (1927) 5 Rang. 73, 102 I. C. 389, ('27) A. R. 140. See also *Kirkham v. Peel* (1880) 43 L. T. 171.

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is afterwards adjudged insolvent, the right to recover the insurance money vests in the Official Assignee or Receiver, and not in the owner of the goods (u). But if the goods are insured by the owner, the insurance money goes to the owner, and not to the Official Assignee or Receiver (v).

499. Stockbrokers.—By the Rules of the London Stock Exchange, when a member is declared a defaulter, contracts made by him for the next settling day, for the purchase and sale of stocks and shares, are closed by a person, called the official assignee, appointed by that body, *at the market prices at the time of the default*, and those members who, on that footing, owe differences upon their contracts with the defaulter are bound to pay those differences to the official assignee, and the official assignee is bound to employ the money thus received by him in paying to those members, to whom upon the same footing differences are due upon their contracts with the defaulter, the differences so due to them. The money thus received by the official assignee, being an artificial fund created by the Rules of the Stock Exchange, does not form part of the assets of the defaulter, and does not pass to his trustee in bankruptcy. If, however, there is a surplus after payment of the Stock Exchange creditors, it will belong to the trustee in bankruptcy, unless there is an individual creditor who can follow it as trust property (w).

The Rules of the Stock Exchange operate to effect an assignment of *all* the assets of the defaulting member to the official assignee of the Stock Exchange; that assignment, unless invalidated in bankruptcy proceedings against the defaulter, is valid as against persons who are not, as well as those who are, members of the Stock Exchange (x). The assignment, however, is an act of bankruptcy (y), and it is open to any creditor who is not a member of the Stock Exchange to take proceedings in bankruptcy against the defaulter in which case there would be an equal distribution of the assets of the debtor among all the creditors (z); and if bankruptcy supervenes within three months of the default, the trustee in bankruptcy is entitled to recover from the official assignee all assets of the defaulter which have come into his hands except the artificial fund (a). The receipt by a Stock Exchange creditor of a dividend from the artificial fund will not

- (u) *In the matter of Syed Kazim* (1927) 5 Rang. 73, 102 I. C. 389, ('27) A. R. 140.
- (v) *U. R. Huiyin v. Official Assignee* (1928) 6 Rang. 689, 117 I. C. 51, ('29) A. R. 59.
- (w) *Ex parte Grant* (1880) 13 Ch. D. 667; *Re Woodd* (1900) 82 L. T. 504; *Kaikushroo Talyarkhan v. Bai Gulab* (1929) 53 Bom. 508, ('29) A. B. 236.
- (x) *Lomas v. Graves & Co.* (1904) 2 K. B. 557; *Richardson v. Stormont Todd & Co., Ltd.* (1900) 1 Q. B.

701.

- (y) *Tomkins v. Saffery* (1877) 3 App. Cas. 213, explained in (1901) 1 Q. B. 761, 711, *supra*, and in *Ponsford, Baker & Co. v. Union of London and Smith's Bank, Ltd.* (1906) 2 Ch. 444, 450.
- (z) (1900) 1 Q. B. 701, at pp. 703-704, *supra*.
- (a) 3 App. Cas. 213 [defaulter's bank balance], *supra*; *King v. Hutton* (1900) 2 Q. B. 504 [differences due on a speculative account].

prevent him from suing the defaulting member for the balance, and presenting a bankruptcy petition against the defaulter (b).

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Securities received by a stockbroker for the purpose of selling them, belong to the customer, they having been handed to him for a specific purpose. Similarly money received by a broker for the purchase of stock or shares belongs to the customer, and if paid by him into his banking account, it could be followed by the customer. But where the transactions are a speculative account for differences, the case is different; the relationship between the broker and customer is then that of debtor and creditor, and the remedy of the customer is to prove in the bankruptcy for the amount (c).

Where a stockbroker pledges his customer's securities with his own, relief may be granted to the customer in a proper case on the analogy of the doctrine of marshalling. *A* employed brokers to purchase securities for him, the arrangement being that on each occasion they advanced him part of the purchase price and he paid the margin in cash or on account. It was also part of the arrangement that the money so advanced should be obtained by the brokers from their bankers on deposit of *A*'s securities so purchased. The brokers, however, pledged *A*'s securities and their own with their bankers as cover for their current overdraft. On the bankruptcy of the brokers the bank paid themselves by selling *A*'s securities and handed over the surplus securities in their hands to the trustee in bankruptcy. It was held, by analogy to the doctrine of marshalling, that *A* was entitled to have the surplus securities in the hands of the trustee applied towards satisfaction of the balance due to him from the brokers on the account between them (d).

499A. Trust receipt.—It is a common practice in Calcutta and Bombay for an importing firm to deliver goods to the merchant who has ordered them out against a promissory note for the price thereof and against a writing called a "trust receipt" by which the merchant agrees to hold the goods and the proceeds of the sale of the goods in trust for the firm until the price is paid. The High Court of Calcutta has held that even if the writing amounts to a trust, the transaction is void as against the Official Assignee, the reason given being that a trust must be created in good faith and that to create a trust by a writing of the kind mentioned above would be to give preference to one creditor over other creditors (d1). This view, it is submitted, is erroneous, for there is no moral turpitude involved in a debtor preferring one creditor over his other creditors and the transaction is perfectly valid unless it comes within the terms of the fraudulent preference section. See para. 631 below.

(b) *Mendelssohn v. Ratcliff* (1904) A. C. 456; *Re Ward* (1882) 22 Ch. D. 132.

(c) *King v. Hutton* (1900) 2 Q. B. 504; *Ex parte Woodd* (1900) 82 L. T. 504; *Ex parte Cooke* (1876) 4 Ch.

D. 123.

(d) *Re Burge Woodall & Co.* (1912) 1 K. B. 393.

(d1) *Re Nripendra Kumar Bose* (1929) 56 Cal. 1074.

2. Tools of trade, wearing apparel, etc.

Para. 500 500. Tools of trade, wearing apparel, etc. [P.-t. I. A., s. 52 (1); Prov. I. A., s. 28 (5)].—It is provided by both the Acts that the insolvent shall be entitled to retain certain property which is not to be divisible amongst his creditors. Such property under the Presidency-towns Insolvency Act, consists of the tools of trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessities as aforesaid, not exceeding Rs. 300 in the whole.

The Provincial Insolvency Act contains a general provision that property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force (e) from liability to attachment and sale in execution of a decree, is not divisible among the creditors of the insolvent. Property exempted from attachment and sale under sec. 60 of the Code includes (1) the necessary wearing apparel, cooking vessels, beds, and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with the religious usage cannot be parted with by any woman; (2) tools of artisans and, where the judgment-debtor is an agriculturist, his implements of husbandry, etc., (3) houses and other buildings belonging to an agriculturist and occupied by him as such for the purpose of agriculture, that is, in order to enable him to cultivate the land. The term "agriculturist" denotes a person making his living by tilling the soil, in other words, one whose sole means of livelihood is gained by cultivating land. It includes a small holder of land who tills the soil, but not a large landed proprietor, even though his sole income is derived from land (f).

The object of allowing an insolvent to retain his tools of trade and implements of husbandry is to enable him to earn his living (g).

(e) Provident Funds Act, 19 of 1925, s. 3; Pensions Act 23 of 1871, ss. 4 and 11; Central Provinces Tenancy Act I of 1920, and other Provincial Tenancy Acts. See also *Sagar Mal v. Rao Girraj Singh* (1917) 39 All. 120; 38 I. C. 171, a case under the Agra Tenancy Act, 1901, s. 20 (2), where it was held that the interest of an occupancy tenant is not saleable in execution; *Hanuman Prasad v. Harakh Narain* (1920) 42 All. 142,

58 I. C. 551, a case under the Bundelkhand Alienation of Land Act, 1903, s. 16, where it was held that land belonging to members of agricultural tribes was not saleable in execution.

(f) *Nuthuvenkatarama Reddiar v. Official Receiver, South Arcot* (1926) 49 Mad. 227, 92 I. C. 398, (26) A. M. 350.

(g) *Re Sherman* (1915) 32 T. L. R. 232; *Re Roberts* (1900) 1 Q. B. 122, 128.

II.—PROPERTY DIVISIBLE AMONGST CREDITORS.

1. Property belonging to insolvent at commencement of insolvency.

501. Definition of property.—“ Property ” includes any property over which, or over the profits of which, any person has a disposing power which he may exercise for his own benefit (h).

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The property of the insolvent which is divisible among his creditors comprises the following particulars, namely :—

1. Property which may belong to him at the commencement of the insolvency.
2. Property which may be acquired by or devolve on him after the date of the order of adjudication and before his discharge.
3. The capacity to exercise all such powers in respect of property as might have been exercised by him for his own benefit at the commencement of the insolvency or before his discharge. [This is not specifically included in the Provincial Insolvency Act.]
4. Goods in the possession, order or disposition of the insolvent.

This part of the Lecture is confined to the first three classes of property. The fourth class forms the subject-matter of Lecture IX.

502. Possibilities.—A bare possibility, such as the chance of an heir-apparent succeeding to an estate, or the chance of a person obtaining a legacy on the death of a relative, does not pass to the Official Assignee or Receiver (i). But if the relative dies during the continuance of the insolvency leaving the legacy to the insolvent, the right to it will vest in the Official Assignee or Receiver (j). The chance of a reversioner to succeed on the death of a Hindu widow is only a *spes successionis*, and does not pass to the Official Assignee or Receiver (k).

All contingent and executory estates and interests to which the insolvent is entitled pass to the Official Assignee or Receiver ; so also a possibility coupled with an interest (l).

503. Forfeiture clauses in wills and settlements.—There is a distinction between the English law and the Indian law in certain matters relating to the topic now under consideration. It will be convenient

(h) P.-t. I. A., s. 2 (e) ; Prov. I. A., s. 2 (d).

(i) *Carleton v. Leighton* (1805) 3 Mer. 667, 36 E. R. 255 ; *Ex parte Dever* (1887) 18 Q.B. D. 660 ; *Re Vizards Trusts* (1866) L. R. 1 Ch. App. 598. See Transfer of Property Act, 1882, s. 6 (a).

(j) *Johnson v. Smiley* (1853) 17 Beav. 223, 230, 51 E. R. 1019, per Romilly, M. R.

(k) *Babu Anaji v. Ratnoji* (1896) 21 Bom. 319.

(l) *Davidson v. Chalmers* (1864) 33 L. J. Ch. 622.

Para. 503 first to state the rules of English law, and then to note the points of difference between the two systems of law [see p. 338 below].

English law.—An owner of property may, by deed or will, qualify the interest of the donee by a condition defeating it on bankruptcy. He may give the income to the donee *until* he shall become bankrupt and after his bankruptcy over (*m*). Similarly he may give an annuity to a person with a proviso that if he shall at any time do or permit any act whereby the same shall be alienated, charged or encumbered, the annuity shall go over to some other person. In either case if bankruptcy ensues his interest will cease, and it will not pass to his trustee in bankruptcy. Thus where a testator bequeathed certain income to his son for life, “until he should become bankrupt, or do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vest in some other person,” and the testator directed that if the trust should determine in the son’s lifetime, the trustees should, during the remainder of his life, apply the income for the benefit of certain other persons, it was held that a receiving order in bankruptcy against the son determined his interest in the income, and the income passed to the other persons named in the will (*n*). But to exclude the right of the trustee in bankruptcy, there must be a gift over in the event of the bankruptcy of the beneficiary, as it was in the above case; otherwise the proviso for the cesser of his interest will have no effect, and his interest, whatever it may be, will pass to the trustee, and will be divisible among his creditors (*o*).

A person, however, cannot make a settlement of his own property on himself defeasible in the event of his bankruptcy, because such a defeasance is void as a fraud on bankruptcy laws. “The general distinction seems to be that the owner of property may, on alienation, qualify the interest of his alienee, by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining it or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors” (*p*). Though such an alienation cannot take effect so as to defeat and delay creditors, it is nevertheless effective as against the alienator so that if, having settled property on himself for life, he is adjudicated bankrupt, the bankruptcy will operate as a forfeiture of his life estate, and if any residue is left after paying his creditors by means of the settled fund, he will have no right in respect thereof. The residue will be held

(*m*) *Brandon v. Robinson* (1811) 18 Ves. 429, 34 E. R. 379.

(*n*) *Re Sartoris's Estate* (1892) 1 Ch. 11; *Re Laye* (1913) 1 Ch. 298; *Ex parte Eyston* (1877) 7 Ch. D. 145. See also *Mackintosh v. Pogose* (1895) 1 Ch. 505; *Montefiore v. Guedalla* (1901) 1 Ch. 435.

(*o*) *Graves v. Dolphin* (1826) 1 Sim. 66, 57 E. R. 503; *Brandon v.*

Robinson (1811) 18 Ves. 429, 34 E. R. 379; *Bird v. Johnson* (1854) 18 Jur. 976 (gift of an absolute interest—no gift over).

(*p*) *Wilson v. Greenwood* (1818) 1 Swans. 471, 485, 36 E. R. 469, 475; *Mackintosh v. Pogose* (1895) 1 Ch. 505, 511. See also *Merry v. Pownall* (1898) 1 Ch. 306.

by the trustees of the settlement for the benefit of the persons entitled in remainder under it (q). **Para. 503**

Where an interest for life is made determinable on the bankruptcy of the donee, and it appears from the instrument creating the interest that the donor intended to benefit the donee personally and that the property intended for the object of his bounty should not pass to a stranger, effect will be given to such intention, and the clause of forfeiture will be applied even to a bankruptcy existing at the date of the settlement or the death of the testator, although the instrument apparently contemplated a future bankruptcy. Thus where by a settlement made in 1842 trust funds were settled upon trust to pay the income to the settlor for life, and, after his death, to pay the income to E. M. for life or "until he should become bankrupt," and after his decease or "upon his becoming bankrupt," to pay the income to the wife or widow of E. M. for her separate use, and E. M. was *at the date of the settlement* an uncertified bankrupt, it was held that on the death of the settlor (which took place in 1845), the income of E. M.'s share went to his wife for her separate use (r).

If the bankrupt's interest is made to cease on his bankruptcy, but before the first payment becomes due, the bankrupt obtains an annulment of his bankruptcy, the position is the same as if there was no bankruptcy. No forfeiture will ensue and the bankrupt will be entitled to the income (s). If, on the other hand, the income becomes payable before the annulment, the clause of forfeiture will take effect, and the person entitled to the income will be the person entitled to the gift over (t). As stated by an eminent writer, "in determining whether a forfeiture clause takes effect the crucial time in the case of a gift of income is the time when the right to have the part payment of income accrues. If at that time the bankruptcy is not annulled, the right is then finally vested in the persons entitled to the gift over, and it is impossible to take it away from them" (u).

When the income of a fund vested in trustees is given to a man for his life, with a proviso that if he becomes bankrupt his interest shall determine, and the trustees shall thenceforward apply the income at their absolute discretion for the support and maintenance of the bankrupt, his wife and children, or any of them, the trustees are not bound to apportion the income between the bankrupt, his wife and children so as to give his trustee in

(q) *Re Johnson* (1904) 1 K. B. 134.

(r) *Manning v. Chambers* (1847) 1 De G. & Sm. 282, 63 E.R. 1069; *Seymour v. Lucas* (1860) 1 Dr. & Sm. 177, 62 E. R. 345; *White v. Chitty* (1866) L. R. 1 Eq. 372; *Trappes v. Meredith* (1871) L. R. 7 Ch. App. 248.

(s) *White v. Chitty* (1866) L. R. 1 Eq. 372; *Lloyd v. Lloyd* (1866) L. R. 2

Eq. 722; *Re Parnham's Trusts* (1876) 46 L. J. Ch. 80; *Ancona v. Waddell* (1878) 10 Ch. D. 157. The rule does not apply to conditions in a covenant; *West v. Williams* (1899) 1 Ch. 132, 148.

(t) *Robertson v. Richardson* (1885) 30 Ch. D. 623.

(u) *Williams on Bankruptcy*, 13th ed., p. 246.

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bankruptcy a claim to any specific sum as against his wife and children (v). If, however, the trustees, in the exercise of their discretion, pay to the bankrupt more than is necessary for his mere support, he can be made to account for the excess to his trustee in bankruptcy (w).

Indian law.—The foregoing rules apply in India except in one respect, and it is this that while in England property may be validly settled by deed or will so as to give a person an interest for life defeasible on bankruptcy or attempted alienation, in India it cannot be done by transfer *inter vivos* (w1), though it may be done by will (w2). This, no doubt, is an anomaly, and should be removed at the earliest opportunity.

504. Forfeiture of lease on insolvency.—A condition in a lease of immovable property that if the lessee become insolvent, the lease should be forfeited and the landlord should have a right to re-enter is valid. Where a lease contains such a condition and the lessee becomes insolvent, the landlord, and not the Official Assignee or Receiver, is entitled to possession of the property (x). A condition of this kind applies only to the insolvency of the person who is possessed of the term created by the lease, and if the lessee assigns the lease and subsequently becomes bankrupt, his insolvency does not operate to determine the lease, and no right of re-entry accrues to the lessor (y). In England the Court may relieve against forfeiture on the bankruptcy of the lessee upon certain terms as provided by sec. 146 of the Law of Property Act, 1925. The same section contains provisions for the benefit of persons claiming as under-lessees. There are no such provisions in the Transfer of Property Act, 1882.

505. Forfeiture of lease on assignment.—A covenant in a lease not to "assign or underlet" the demised premises without the assent of the lessor applies only to voluntary acts, and not to acts by operation of law. Therefore the filing of a petition in insolvency by the lessee followed by adjudication does not operate as a breach of the covenant, and the lessor is not entitled to re-enter and take possession of the premises (z). The Official Assignee or Receiver is the person entitled to the lease, and the leasehold property passes to him subject to the covenants under which the premises are held. Further, the Official Assignee or Receiver is not bound by the covenant not to assign, and he may assign the lease without the lessor's consent, although the covenant extends to the lessee, his executors, administrators or assigns. The reason is that the insolvent's leasehold interest vests in the Official Assignee by operation of law; he is not, therefore, an assignee of the insolvent lessee and consequently not bound by the covenant (a).

Where a lease contains a proviso for re-entry and forfeiture in the event of the lessee assigning his interest without the assent of the lessor, and the

- (v) *Kearsley v. Woodcock* (1843) 3 Hare 185, 67 E. R. 348; *Holmes v. Penny* (1856) 3 K. & J. 90, 69 E. R. 1035.
(w) *Re Ashby* (1892) 1 Q. B. 872, 877.
(w1) See Transfer of Property Act, 1882, s. 12.
(w2) See Indian Succession Act, 1925,

- s. 120, ill. (vii).
(x) Transfer of Property Act, 1882, ss. 12 and 111.
(y) *Smith v. Cronow* (1891) 2 Q. B. 394.
(z) *Re Riggs* (1901) 2 K. B. 16.
(a) *Doe v. Bevan* (1815) 3 M. & S. 353, 105 E. R. 644.

lessee assigns all his property for the benefit of his creditors, and afterwards becomes bankrupt, the assignment being void as an act of bankruptcy does not operate as a forfeiture, and the lease will pass to the Official Assignee (b). If, on the other hand, the assignment is not followed by bankruptcy, it is a voluntary breach of the covenant not to assign, and it will operate as a forfeiture (c).

506. Forfeiture of share in partnership.—A provision in a partnership deed that, in the event of the insolvency of a partner, his share or any part of it, shall go over to his co-partners, is void as a fraud on the bankruptcy law. This decision proceeds on the principle that no person possessed of property can reserve that property to himself until he shall become insolvent, and then provide that, in the event of his becoming insolvent, it shall pass to another and not to his creditors. On the other hand, a provision giving an option to take the share of an insolvent partner at a valuation is valid, the object of such a clause being to secure the going on of the concern (d).

507. Compulsory transfer of shares in a company.—Provisions in a company's Articles of Association compelling a shareholder at any time during the continuance of the company to transfer his shares to particular persons at a particular price are not void as being repugnant to absolute ownership or as tending to perpetuity. Moreover there is nothing repugnant to the bankruptcy law in articles which *bona fide* provide that a shareholder shall, in the event of his bankruptcy, sell his shares to particular persons at a particular price, which is fixed for all persons alike, and is not shown to be less than the fair price which might otherwise be obtained (e).

508. Additional security to mortgagee on mortgagor's insolvency.—A person cannot make it a part of his contract that, in the event of insolvency, he is to get some additional advantage which will prevent the property from being distributed under the bankruptcy laws. A provision, therefore, in a mortgage deed that the mortgagee should have, in the event of the mortgagor's insolvency, an additional security is void as a fraud upon the bankruptcy law (f). A sells a patent to B in consideration of B paying royalties to A. B at the same time advances Rs. 1,25,000 to A, and it is agreed that B should retain one-half of the royalties as they become payable towards satisfaction of the debt, provided that if A should become insolvent B may retain the whole of the royalties in satisfaction of the debt. A becomes insolvent before the debt is fully paid. The proviso that B may retain the whole of the royalties in case of A's insolvency is void,

- (b) *Doe v. Powell* (1826) 5 B. & C. 308,
108 E. R. 115. See *Stein v. Pope*
(1902) 1 K. B. 595, 598.
- (c) *Holland v. Cole* (1862) 1 H. & C.
67, 158 E. R. 803.
- (d) *Whitmore v. Mason* (1861) 2 J. &

- H. 204, 70 E. R. 1031; *Ex parte*
Warden (1872) 21 W. R. 51.
- (e) *Borland's Trustees v. Steel Brothers*
& Co., Ltd. (1901) 1 Ch. 279.
- (f) *Ex parte Williams* (1877) 7 Ch. D.
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and *B* has a charge not on the whole, but on one-half only of the royalties (*g*). A debtor may not, by stipulation with a creditor, provide for a different distribution of his effects in the event of insolvency from that which the law provides (*h*).

509. Contracts made by insolvent prior to insolvency.—The effect of an order of adjudication is to vest in the Official Assignee or Receiver every beneficial matter belonging to the insolvent's estate, and amongst others the right of enforcing unexecuted contracts by which benefits may accrue to that estate. The contracts must be such as may be performed on the part of the insolvent by the Official Assignee or Receiver and would pass as part of his personal estate to his executors if he had died, and not contracts where the personal skill or conduct of the insolvent forms a material part of the consideration (*i*). See para. 510 below, "Contracts involving personal skill."

Insolvency does not determine a contract (*j*). Much hardship would ensue if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be unfair to him as well as to his creditors if they could not have the benefit of those contracts (*k*). But although insolvency does not operate as a rescission of a contract, conduct on the part of the insolvent or the Official Assignee which practically gives notice to the creditors and those with whom the insolvent has contracted that he does not mean to pay any of his debts or perform any of his contracts may amount to a refusal of performance entitling the other party to the contract to rescind (*l*).

As regards an insolvent's contracts for the purchase or sale of lands or goods, whatever interest therein the insolvent possesses, and any liability to which he is subject thereon, at the time of his insolvency, passes to the Official Assignee or Receiver (*m*). The Official Assignee, however, has power to disclaim an unprofitable contract (*n*). At the same time, any party who is, as against the Official Assignee, entitled to the benefit or subject to the burden of a contract made with the insolvent, may apply to the Court for an order rescinding the contract, and the Court may make such an order on such terms as to payment of damages to or by either party for non-performance of the contract, or otherwise, as it may deem equitable. If such damages are payable by the insolvent, the party

(*g*) *Ex parte Mackay* (1873) L. R. 8 Ch. App. 643.

(*h*) L. R. 8 Ch. App. 643, at p. 647, *supra*.

(*i*) *Gibson v. Carruthers* (1841) 8 M. & W. 321, at p. 333, 151 E. R. 1061, 1066-1067; *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (1907) 34 Cal. 280. See the Indian Contract Act, 1872, s. 37.

(*j*) *Brooke v. Hewitt* (1796) 3 Ves. 253, 30 E. R. 997, 998.

(*k*) *Ex parte Chalmers* (1873) L. R. 8 Ch. App. 289, 293-294, per Mellish, L.J.

(*l*) *Ex parte Chalmers* (1873) L. R. 8 Ch. App. 289, 294, per Mellish, L.J.; *Morgan v. Bain* (1874) L. R. 10 C. P. 15.

(*m*) *Ex parte Holthausen* (1874) L. R. 9 Ch. App. 722, 726; *St. Thomas' Hospital v. Richardson* (1910) 1 K. B. 271.

(*n*) P.-t. I. A., s. 62 (1).

to whom they are payable may prove for them as a debt under the insolvency (o). **Para. 509**

(1) *Contracts relating to immovable property.*—The benefit of a contract for a sale of immovable property to the insolvent passes to the Official Assignee or Receiver, and he is entitled to sue for specific performance of the contract. Similarly, the benefit of a contract for a lease to the insolvent (p), and the benefit of an option to take a lease, passes to the Official Assignee or Receiver (q). But a decree for specific performance would probably be refused if the contract for a lease was entered into for the personal accommodation of the insolvent (r). Similarly specific performance may be decreed against the Official Assignee or Receiver of a contract by the insolvent of a sale of his land (s). But a contract by the insolvent to buy property or to take a lease cannot be specifically enforced against the Official Assignee. Such a contract is the subject of disclaimer (t). Still whatever may be the nature of the contract, if the Official Assignee insists on the performance of the contract, he must perform the insolvent's part of the contract to the same extent to which the insolvent should have done had he remained solvent (u). See para. 525 (3).

(2) *Contracts relating to goods.*—Where goods are sold for cash, the seller has a lien on the goods as long as they remain in his possession and the price is not paid (v). If the buyer becomes insolvent, the Official Assignee or Receiver is not entitled to the possession of the goods until he pays for them in cash. Where goods are sold on credit, and no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to present delivery of the goods without payment; but if the buyer becomes insolvent before delivery of the goods, insolvency qualifies the buyer's rights, and the seller is entitled to retain the goods until they have been paid for in cash (w). The seller's lien is available so long as he holds any part of the goods. Thus where the contract is for delivery and payment by distinct instalments, and the buyer becomes insolvent in the course of performance of the contract, the seller is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if money is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid for the goods already delivered, as well as the price of those still to be delivered (x). A seller who has parted

(o) P.-t. I. A., s. 65.

(p) See *Brooke v. Hewitt* (1796) 3 Ves. 253, 30 E. R. 997; *Willingham v. Joyce* (1796) 3 Ves. 168, 30 E. R. 951; *Buckland v. Hall* (1803) 8 Ves. 92, 32 E. R. 287.

(q) *Buckland v. Papillon* (1866) L. R. 2 Ch. App. 67.

(r) *Flood v. Finlay* (1811) 2 Ball & B. 9.

(s) *Ex parte Holthausen* (1874) L. R. 9 Ch. App. 722.

(t) *Holoway v. York* (1877) 25 W. R. 627. P.-t. I. A., s. 62 (1).

(u) *Gibson v. Carruthers* (1841) 8 M. & W. 321, 333, 151 E. R. 1061.

(v) Indian Contract Act, 1872, s. 95.

(w) Indian Contract Act, 1872, s. 96.

(x) *Ex parte Chalmers* (1873) L. R. 8 Ch. A pp. 289, 291.

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with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer, that is to say, he may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price (y). If both the property in the goods and the possession have passed to the insolvent, the Official Assignee or Receiver takes the goods, and, if they have not been paid for, the seller's only remedy is to prove for the price in the insolvency (z).

510. Contracts involving personal skill.—Contracts in which personal skill or other personal qualifications to be exercised by the insolvent form a material part of the consideration do not pass to the Official Assignee or Receiver (a). In *Bailey v. Thurston & Co., Ltd.* (b), Sterling, L.J., said: "In the case of a contract *in fieri* and unexecuted, which cannot be completed without the assistance of the bankrupt, the trustee would be unable to complete it without the co-operation to the bankrupt nor could the trustee compel such co-operation. Such a contract is incapable of assignment and in my opinion it is impossible to hold that it would vest in the trustee on the bankruptcy occurring." Thus if an insolvent has entered into a building contract before his insolvency, and the contract provides that the building work shall be executed by "his executors and administrators" (omitting "assigns"), the Official Assignee is not entitled to claim to complete it (c). Similarly a personal contract by an author with his publisher to publish a work does not pass to the Official Assignee or Receiver on the insolvency of the publisher (d). But a contract to promote a company, and to procure subscriptions for a certain number of the shares of the company, is not a contract of personal service (e). It may here be observed that secret formulas for the manufacture of specific articles are "property," and the bankrupt is not entitled to refuse to disclose them to the trustee in bankruptcy on the ground that they exist only in his brain as the result of his skill and capacity (f).

Right of action for breach of contract for personal service.—The right of action for a breach of a contract, even if it be one requiring the personal skill of the insolvent, passes to the Official Assignee or Receiver where the breach has occurred before insolvency, and money is recoverable by the insolvent as damages for the breach. Thus where a foreman engaged for a firm of type-founders for a term of seven years was dismissed before

(y) Indian Contract Act, 1872, s. 99.

(z) *Ex parte Whittaker* (1875) L. R. 10 Ch. App. 446.

(a) *Gibson v. Carruthers* (1841) 8 M. & W. 321, 151 E.R. 1061; *Bailey v. Thurston & Co., Ltd.* (1903) 1 K. B. 137.

(b) (1903) 1 K. B. 137, 145.

(c) *Knight v. Burgess* (1864) L. J. Ch. 727. See Indian Contract Act, 1872, s. 37.

(d) *Lucas v. Moncreiff* (1905) 21 T. L. R. 683.

(e) *Re Worthington* (1914) 2 K.B. 299.

(f) *Re Keene* (1922) 2 Ch. 475.

the expiration of the term and he was afterwards adjudged bankrupt, it was held that the trustee in bankruptcy, and not the foreman, was entitled to sue for damages for wrongful dismissal (*g*). Similarly, where an agent employed to sell a property negotiates the sale before his insolvency, but the remuneration for his services is to be paid on completion of the sale, the Official Assignee or Receiver is entitled to the remuneration though the sale is not completed until after his discharge (*h*). If, however, the contract is unexecuted at the date of the insolvency, and the breach occurs after the insolvency, the right of action does not vest in the Official Assignee or Receiver, but remains in the insolvent who can sue in respect of it. Thus an undischarged insolvent employed as a travelling agent for a firm under a contract made before the commencement of the insolvency can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the insolvency, but the Official Assignee or Receiver, being entitled to the fruits of litigation, is entitled to intervene, and the Court may on his application add him as a plaintiff in the suit (*i*). The reason why the right of action does not vest in the Official Assignee or Receiver is that if a contract for personal service entered into before insolvency remains unexecuted at the date of insolvency, the insolvent cannot be compelled to complete it for the benefit of his creditors (*j*).

511. Contract of service to be rendered to insolvent.—A man who has agreed to do work and labour for an insolvent—a foreman, for instance, who has been engaged for three years, is not bound to go on serving him without the prospect of getting paid. He is entitled to say, “I refuse to continue to serve unless I am secured my wages.” With that reservation the contract continues, as the Official Assignee or Receiver is always entitled to perform it, and so long as he performs it he gets the entire benefit of it, but he may at any time abandon it. He may either not take up the contract at all, or he may take it up for a time, and then afterwards, if he finds that it is not a beneficial contract, he may abandon it, and in that case the other party to the contract may prove against the estate of the insolvent for the damages occasioned by the breach of the contract, and beyond that he has no remedy (*k*).

The Official Assignee or Receiver takes the benefit of a contract subject to its terms and conditions. Thus if a building contract provides for payment to the builder by monthly instalments, less 10 per cent. on the certificate of

(*g*) *Beckham v. Drake* (1849) 2 H. L. C. 579, 9 E. R. 1213 affirming *Drake v. Beckham* (1843) 11 M. & W. 315, 152 E. R. 823.

(*h*) *Re Byrne* (1892) 9 Morr. 213.

(*i*) *Bailey v. Thurston & Co., Ltd.* (1903) 1 K. B. 137; *Re Roberts* (1900) 1 Q. B. 122; *Emden v. Carter* (1881) 17 Ch. D. 169, and on appeal at

p. 768.

(*j*) *Bailey v. Thurston & Co., Ltd.* (1903) 1 K. B. 137, 145. As to the right of an insolvent to alter a contract for personal service, see *Re Shine* (1892) 1 Q. B. 522.

(*k*) *Re Sneezum* (1876) 3 Ch. D. 463, 473-474, per Mellish, L. J.

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the employer's engineer, and the contract also provides that certain goods to be supplied by certain tradesmen should be paid for by the builder, but that if he unduly delays payment, the employer may then deduct the sum so paid from the retention money and other moneys due to the builder, the power conferred by the contract on the employer is not revoked where the builder becomes insolvent on his own petition, for by such petition he unduly delays payment within the meaning of the contract, and, in consequence, the tradesmen are entitled to be paid the amount due to them out of the retention money and other moneys due to the insolvent in priority to the claim of the Official Assignee or Receiver (*l*).

512. Goodwill.—If the insolvent has before his insolvency carried on a business, the goodwill of the business passes on adjudication to the Official Assignee or Receiver in the same way as any other property of the insolvent, but goodwill which is personal to the insolvent, as in the case of a professional man, does not pass to the Official Assignee or Receiver (*m*).

The Official Assignee or Receiver may sell the goodwill of the business (*n*). On a sale, however, of goodwill by the Official Assignee or Receiver, the purchaser is not entitled to restrain the insolvent from *bona fide* beginning a new business and soliciting his old customers. The insolvent cannot, on the sale of the goodwill, be compelled to enter into a covenant not to carry on a similar business. But if he has entered into a covenant not to carry on a similar business within specific local limits, which limits must be reasonable, he can to that extent be restrained from carrying on business (*o*).

513. Things in action.—Where any part of the property of the insolvent consists of things in action, such as debts due to the insolvent, they shall be deemed to have been duly transferred to the Official Assignee or Receiver (*p*). But the Official Assignee or Receiver takes the things in action subject to all equities which may affect them (*q*).

514. Share in partnership.—If the insolvent has carried on business in partnership with other persons, the partnership is not dissolved, as it would be under the English law, by his insolvency, but the other partners may in that event institute a suit for dissolution of partnership (*r*). The insolvent's share in the partnership will, however, vest in the Official Assignee or Receiver. But the Official Assignee or Receiver has no right to take possession of the goods of the partnership without the consent of the other partners in whose possession they may happen to be (*r1*).

(*l*) *Re Wilkinson* (1905) 2 K. B. 713.

(*m*) *Walker v. Mottram* (1881) 19 Ch. D. 355.

(*n*) P.-t. I. A., s. 68 (1) (*a*); Prov. I. A., s. 59 (1) (*a*).

(*o*) *Walker v. Mottram* (1881) 19 Ch. D. 355; *Trego v. Hunt* (1896) A. C. 7, 23; *Buxton Publishing Co. v. Mitche1* (1885) 1 Cab. & El. 527. See Indian Contract Act, 1872. s. 27.

(*p*) P.-t. I. A., s. 58 (4); *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (1907) 34 Cal. 289.

(*q*) *Re Wallis* (1902) 1 K. B. 719. See Transfer of Property Act, 1882, s. 132.

(*r*) Indian Contract Act, 1872, s. 254. Partnership Act, 1890, s. 53 & 54 Vict., c. 39, s. 32.

(*r1*) *Wilson v. Nathmull* ('30) A. M. 458.

515. Compulsory deposit in Provident Fund.—“Compulsory deposit” means a subscription to, or deposit in, a Provident Fund which, under the rules of the Fund, is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia in respect of a policy of life insurance, and includes any contribution credited in respect of any such subscription or deposit and any interest or increment which has accrued under the rules of the Fund on any such subscription, deposit, or contribution, and also any such subscription, deposit, contribution, interest or increment remaining to the credit of the subscriber or depositor after the happening of any such contingency (s).

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A compulsory deposit in any Government or Railway Provident Fund is not in any way capable of being assigned or charged and is not liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor Receiver is entitled to, or has any claim on, any such compulsory deposit (t). This exemption was created for the first time by the Provident Funds Act, 1897 (u). Prior to that Act money standing to the credit of a person in a Provident Fund was liable to attachment. It also vested on his insolvency in the Official Assignee or Receiver as his “property” (v). The Act of 1897 was repealed by the Provident Funds Act, 1925, which is the Act now in force.

Money standing to the credit of the insolvent in a Provident Fund and withdrawn by him after his insolvency and before his discharge, is after-acquired property within the meaning of sec. 52 (2) (a) of the Presidency-towns Insolvency Act, and the corresponding sec. 28 (4) of the Provincial Insolvency Act. Being after-acquired property, it does not, in cases governed by the Presidency-towns Insolvency Act, vest in the Official Assignee until he intervenes on behalf of the creditors, and a transfer of such property by the insolvent, *bona fide* and for value, made before intervention by the Official Assignee is valid (w). It has been held in a Bombay case that the same principle applies to cases governed by the Provincial Insolvency Act (x). This view, it is submitted, is erroneous. The Court seems to have overlooked the word “forthwith” which occurs in sec. 28 (4) of the Provincial Insolvency Act, a word which does not occur in the Presidency-towns Insolvency

(s) Provident Funds Act 19 of 1925, s. 2 (a).

(t) Provident Funds Act 19 of 1925, s. 3 (1). As to deposit in a Provident Fund by an optional subscriber, see *Jagannath v. Jara Prasanna* (1924) 3 Pat. 74, 80 I. C. 424, ('24) A. P. 524. See also Code of Civil Procedure, 1908, s. 60 (1) (k).

(u) See *Official Assignee of Madras v. Mary Dalgairns* (1903) 26 Mad. 440.

(v) *Re the Petition of E. J. S. Shrewsbury* (1886) 10 Bom. 313.

(w) See *Macleod v. B. B. & C. I. Ry. Co.* (1905) 7 Bom. L. R. 618, at p. 621.

(x) *Nagindas v. Ghelubhai* (1920) 44 Bom. 673, 678-681, 56 I. C. 449.

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Act. Under sec. 28 (4) of the Provincial Insolvency Act all property acquired by the insolvent after insolvency and before discharge vests "forthwith" in the Receiver. Consequently the vesting is not postponed until the Receiver intervenes (see para. 536 below).

A "compulsory deposit," so long as it remains in the hands of Government or of a Railway Administration, is not attachable, nor does it vest in the Official Assignee or Receiver either while the subscriber or depositor is in service or on his death or retirement (y). The deposit retains its character of "compulsory deposit" until it is paid over to the subscriber or depositor, but it ceases to have that character after it is paid over to him. After payment it becomes the "property" of the payee, and it may be attached like any other property of his (z).

516. Property abandoned by Official Assignee as worthless.—Where a particular item of property belonging to the insolvent, *e.g.*, a mortgage security, is abandoned by the Official Assignee or Receiver as being of no value at all, and the insolvent obtains his discharge, the property belongs to the insolvent, and the sale thereof by the insolvent after his discharge will pass a good title to the purchaser (a).

517. Patent.—Patents and trade-marks which belong to an insolvent pass to the Official Assignee or Receiver for the benefit of the insolvent's creditors (b).

518. Copyright.—Under the English law, where the property of a bankrupt comprises the copyright in any work of which he is not the author, and he is liable to pay to the author of the work a share of the profits in respect thereof, the trustee in bankruptcy is not entitled to sell any copies of the work except on the terms of paying to the author such sums by way of share of the profits as would have been payable by the bankrupt, and he cannot deal with the copyright in such a manner as to entail any loss of profits to the author without the consent of the author or of the Court (c).

519. Licence to seize goods.—A mere power or licence to seize the debtor's property must be distinguished from an assignment of such property. A mere licence or authority given by a debtor to his creditor to enter on the debtor's premises and to seize and sell all the debtor's

- (y) *Veerchand v. B. B. & C. I. Railway* (1904) 29 Bom. 259; *Hindley v. Joy Narain* (1919) 46 Cal. 962, 54 I.C. 439; *Secretary of State for India v. Raj Kumar* (1923) 50 Cal. 347, 77 I.C. 1025, ('23) A. C. 585; *Devi Prasad v. Secretary of State for India* (1923) 45 All. 554, 74 I. C. 746, ('24) A. A. 63.
(z) *Gouri Shanker v. De Cruze* (1926)

- 1 Luck. 313, 92 I.C. 673, ('27) A. O. 22.
(a) *Sheonandan v. Kashi* (1917) 39 All. 223, 37 I.C. 878.
(b) See *Hesse v. Stevenson* (1803) 3 Bos. & P. 565, 127 E.R. 305, Patents; *Re Graydon* (1896) 1 Q. B. 417 [royalties].
(c) B. A., 1914, s. 60.

goods which *might be acquired* by the debtor and brought on the premises at a future time, if it has not been executed before the commencement of the insolvency, is determined by the debtor's insolvency. The creditor does not by a mere licence to seize acquire any *interest* in the after-acquired goods. His only right is to seize the goods if default is made in payment. If after default on the part of the debtor the creditor does not seize the goods, he cannot do so after the commencement of the debtor's insolvency. If the debtor is adjudged insolvent before the due date of payment, the creditor cannot seize them, for the right to seize does not arise until after default (d). An *assignment* of future property, on the other hand, creates an *interest* in the property and gives the assignee a security which he can enforce even after the debtor's insolvency. We proceed to consider the peculiar features of such an assignment.

520. Assignment of after-acquired property.—"A man cannot in equity, any more than at law, *assign* what has no existence. A man can *contract to assign* property which is to come into existence in the future, and when it has come into existence *equity*, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment" (e). In other words, though a valid assignment of future property cannot be made at common law, a valid equitable assignment may be made of such property. As soon as the property so assigned by way of anticipation comes into existence the equitable ownership of the property passes automatically to the assignee. In the meantime the assignment has necessarily no immediate operation as such, for there is no present subject-matter upon which it can take effect. It operates presently in equity, however, as if it was a contract to assign that property as and when it comes into existence. An assignment of future property is inoperative in equity unless supported, like other contract, by valuable consideration (f).

In order that a contract to assign may amount to an equitable assignment, it must purport to confer an interest in such property immediately by its own force and without the necessity of any future act on the part of the assignee upon such property coming into existence (g). An assignment of *existing* chattels coupled with words which amount to a mere licence to seize *future property*, will not be construed as regards future property as an equitable assignment of *that* property (h). When a contract to assign

(d) *Thompson v. Cohen* (1872) 41 L. J. Q. B. 221, (1872) L. R. 7 Q. B. 527; *Cole v. Kernot* (1872) L.R. 7 Q.B. 534. A licence to take *immediate* possession of goods is void under the Bills of Sale Act, 1882; see *Ex parte Parsons* (1886) 16 Q.B.D. 532.
(e) *Collyer v. Isaacs* (1881) 19 Ch. D. 342, 351. See also *Brandt's Son &*

Co. v. Dunlop Rubber Co. (1905) A. C. 454, and *Re Wait* (1927) 1 Ch. 606.

(f) Salmond and Winfield, *Law of Contracts*, p. 404.

(g) *Holroyd v. Marshall* (1862) 10 H. L.C. 191, 11 E.R. 999.

(h) *Reeve v. Whitmore* (1864) 33 L.J. Ch. 63.

Para. 520 amounts to an equitable assignment, it operates to transfer the beneficial interest in the property as soon as it is acquired to the creditor (i). When it amounts to a mere licence to seize, the creditor acquires no interest in the property until the licence or authority is executed and the property is seized (j). Thus if a debtor for the purpose of securing a loan assigns to the creditor the goods "which are now in the premises or which may during the continuance of the security be brought on the premises in addition to or in substitution of those goods," and it is agreed that if the loan is not repaid on a specific day, the creditor shall be at liberty to enter the shop and seize and sell the goods and apply the sale proceeds towards payment of the debt, the transaction amounts to an assignment in law of the goods which were then in existence, and the creditor can seize and sell them even after the debtor's insolvency; but the clause as to after-acquired property operates merely as a licence to seize future property and it is determined by the debtor's insolvency unless it has been put in force prior to the commencement of the insolvency.

In order that a contract may operate as an equitable assignment the property must be sufficiently described so that it may be identifiable. Thus if a person assigns future book debts to be acquired by him in the course of his business, he must so describe them that they could be identified when they are acquired. An assignment of future book debts "which might during the continuance of the security become due and owing to the mortgagor," though not limited to book debts in any particular business of the mortgagor, is an assignment of property that can be identified and passes the equitable interest in book debts arising after the mortgage whether in the business carried on by the mortgagor at the time of the mortgage or in any other business (k). In this connection it may be stated that though the property cannot be identified at the time when the contract is made, this does not matter if it can be identified at the time when the Court is asked to carry the contract into effect. As observed by Cotton, L.J., in *Re Clarke* (l), "Vagueness comes to nothing if the property is definite when the Court is asked to enforce the contract."

The effect of the subsequent insolvency of an assignor of future or after-acquired property may now be considered. If the after-acquired property comes into existence prior to the insolvency of the assignor, the equitable assignment is complete and the Official Assignee will take the property subject to the assignment (m). If the property comes into existence

(i) *Holroyd v. Marshall* (1862) 10 H.L. C. 191, 11 E.R. 999.

(j) *Reeve v. Whitmore* (1864) 33 L.J. Ch. 63; *Thompson v. Cohen* (1872) 41 L.J. Q.B. 221 (1872) L.R. 7 Q.B. 527; *Cole v. Kernot* (1872) L.R. 7 Q.B. 534.

(k) *Tailby v. Official Receiver* (1888) 13

App. Cas. 523. In England a general assignment of book debts requires registration under the Bills of Sale Act, 1878; see. B.A., 1914, s. 43.

(l) (1887) 36 Ch. D. 348, 353.

(m) See *Re Wallis* (1902) 1 K. B. 719.

subsequently to the insolvency and before the discharge of the insolvent, the Official Assignee will take the property subject to the assignment if the right of the assignor to recover that which is claimed by the assignee had become complete prior to the insolvency; but not if the right had not become complete before then. In the latter case the assignee has no right to the property. Thus if a debt which is to fall due at a future time is assigned and the debt only falls due after insolvency, the assignee has no right to it; on the other hand, debts due at the date of the assignment, but payable at a future time, may be validly assigned, and if they become payable after insolvency, they will none the less belong to the assignee, and not to the Official Assignee or Receiver (n). This subject is further discussed in paragraph 521 below. Where, however, the after-acquired property only comes into existence after the discharge of the insolvent, the assignee has no right to such property, the reason being that the debtor being released from his debt by the discharge the security falls with it (o).

521. Assignment of future profits of business.—It has been stated above that if a debt which is to fall due at a future time is assigned and the debt only falls due after insolvency, the assignee has no right to it. On the other hand, debts due at the date of the assignment, but payable at a future time, may be validly assigned, and if they become payable after insolvency, they belong to the assignee. We shall give an instance of each class.

A common instance of the former class arises where a trader makes an equitable assignment of the future receipts of his business. Such an assignment even if made for value, is, as regards receipts accruing after the commencement of his subsequent insolvency, inoperative as against the

(n) Halsbury, Laws of England, vol. 2, p. 64, art. 97.

(o) *Thompson v. Cohen* (1872) L.R. 7 Q.B. 527, (1872) 41 L.J. Q.B. 221; *Cole v. Kerne* (1872) L.R. 7 Q.B. 534; *Collyer v. Isaacs* (1881) 19 Ch.D. 342. Expectancies are a species of after-acquired property. Expectancies, such as the chance of an heir-apparent to succeed to an estate or the chance of a relation to obtain a legacy on the death of a kinaman, are not assignable at common law, but contracts to assign them for valuable consideration are recognised in equity on the principle laid down in *Holroyd v. Marshall* (1862) 10 H.L. C. 191, 11 E.R. 999. This principle was followed in India prior to the enactment of the

Transfer of Property Act, 1882 and it is still followed by Indian Courts in cases not governed by the Transfer of Property Act: *Ram Nirunjun Singh v. Prayag Singh* (1882) 8 Cal. 138; *Gitabai v. Balaji* (1893) 17 Bom. 232. The transfer of such expectancies is now forbidden by s. 6 of the Transfer of Property Act, and contracts to assign them have accordingly been held to be void; *Harnath Kuar v. Indar Bahadur Singh* (1923) 50 I. A. 69, 45 All. 179, 71 I.C. 629, ('22) A.P.C. 403; *Annada Mohan Roy v. Gour Mohan Mullick* (1923) 50 I.A. 239, 50 Cal. 929, 74 I.C. 499, ('22) A.P.C. 189; *Sri Jagannada Raju v. Sri Rajah Prasad Rao* (1916) 39 Mad. 554, 29 I.C. 241; *Samsuddin v. Abdul Husein* (1907) 31 Bom. 165.

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Official Assignee because the debts fall due after insolvency (p). An instance of the latter class arises where a person who has transferred goods under a hire-purchase agreement assigns his interest under the agreement to another, who has lent him money, as security for the advance. In such a case the assignment of the instalments which accrue due under the hiring agreement after the commencement of the insolvency of the assignor is valid against the Official Assignee, the reason being that the debt assigned was due at the date of the assignment, although it is not payable until a future time (q). The principle applicable to these two classes of cases has thus been stated by Rigby, L. J., in *Wilmot v. Alton* (r): "Where a person who has entered into contracts in the course of his business ceases to carry on business on account of bankruptcy, there is an important distinction, for the present purpose, between cases in which, the consideration for the contract having been wholly executed by the bankrupt on his part, a sum of money becomes due to him under the contract, and cases of executory contract in which the money will not be earned under the contract unless the person contracting continues to carry on business and fully performs his part of the contract which has only been partially performed at the date of the bankruptcy. In the latter class of cases the bankrupt cannot create greater rights in favour of an assignee from him than he has himself; it rests with the trustee to say whether the business is to be carried on and the contract performed or not, and, if he elects to perform it, he has a right to the consideration for such performance when it becomes due."

522. Insolvency of manager, father or other member of a joint Hindu family :—

(1) *Insolvency of manager*.—On the insolvency of the manager of a joint Hindu family governed by the Mitakshara law, whether he be the father, brother or any other coparcener, there vests in the Official Assignee or Receiver—

(a) the separate property of the insolvent manager and his undivided interest in the joint family property; and

(b) the power which the manager of a joint Hindu family has to alienate the entire joint family property including the interests of the minor coparceners for debts incurred for the benefit of the family (s).

(p) *Ex parte Nicholls* (1883) 22 Ch. D. 782; *Wilmot v. Alton* (1897) 1 Q. B. 17; *Re Collins* (1925) Ch. 556.

(q) *Re Davis & Co.* (1889) 22 Q. B. D. 193; *Ex parte Moss* (1885) 14 Q. B. D. 310.

(r) (1897) 1 Q. B. 17, 22.

(s) *Rangayya v. Thanikachalla* (1896) 19 Mad. 74 [elder brother manager]; *Sardamal v. Aranvayal* (1897) 21

Bom. 205 [uncle manager]; *Nunna v. Chidaraboyina* (1903) 26 Mad. 214 [uncles managers]; *Official Receiver, Anantapur v. Ramachandrapa* (1929) 52 Mad. 248, 114 I. C. 345, (29) A. M. 166 [brother manager.] As to the rights of the Official Assignee to sue on a contract entered into by a manager, see *Grey v. Walker* (1913) 40 Cal. 523, 13 I. C. 753.

(2) *Insolvency of father*—On the insolvency of the father of a joint Hindu family governed by the Mitakshara law, there vests in the Official Assignee or Receiver— Para. 522

(a) the separate property of the insolvent father and his undivided interest in the joint family property; and

(b) the power which the father of a joint family has to alienate his son's share in the joint family property for paying his personal debts not contracted for an immoral purpose. In cases governed by the Presidency-towns Insolvency Act, this power vests in the Official Assignee under sec. 52 (2) of that Act (t). In cases governed by the Provincial Insolvency Act, it vests in the Court or Receiver under sec. 28.(2) of that Act (u). The Official Assignee or Receiver is therefore entitled to sell the entire joint family property including the son's share therein for the payment of the father's personal debts. The power so vested in the Official Assignee or Receiver does not terminate on the father's death. It does not pass by survivorship to the son, and it may be exercised by the Official Assignee or by the Receiver after the father's death (v). Prior to the Privy Council ruling in *Sat Narain v. Behari Lal* (w), it was held in several cases in India that on the insolvency of the father the son's *share itself* vested in the Official Assignee (x). In *Sat Narain's* case, which was a case under the Presidency-towns Insolvency Act, it was held that the *share itself* did not vest in the Official Assignee, although under sec. 52 (2) (b) of that Act, or in some other way, the entire joint family property including the son's share therein may be made available for the payment of the father's personal debts.

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| <p>(t) <i>Sat Narain v. Behari Lal</i> (1925) 52 I. A. 22, 6 Lah. 1, 84 I. C. 883, ('28) A. PC. 18; <i>Official Assignee of Madras v. Ramchandra</i> (1923) 48 Mad. 54, 68 I. C. 898, ('23) A.M. 55; <i>Re Sellamuthu Servai</i>, (1924) 47 Mad. 87, 80 I. C. 108, ('24) A.M. 411; <i>Sat Narain v. Sri Kishen</i> (1926) 7 Lah. 376, 89 I. C. 996, ('25) A. L. 416; <i>Re Balusami</i> (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735; <i>Nunna v. Chideraboyina</i> (1902) 26 Mad. 214 [Indian Insolvency Act, 1848, s. 30].</p> <p>(u) <i>Seetharama v. Official Receiver</i> (1926) 49 Mad. 849, 97 I. C. 825, ('26) A.M. 994; <i>Sankaranarayana v. Rajamani</i> (1924) 47 Mad. 462, 83 I.C. 196, ('24) A.M. 550; <i>Bawan Das v. Chiene</i> (1922) 44 All. 316, 64 I.C. 976, ('22) A.A. 70; <i>Narain Das v. Bankim Chandra Deb</i> (1924) 48 All. 912, 85 I. C. 396, ('25) A.A. 194; <i>Om Prakash v. Motiram</i> (1926) 48 All. 400; 94 I.C. 175, ('26)</p> | <p>A.M. 447; <i>Khemchand v. Narain Das</i> (1925) 6 Lah. 493, 89 I.C. 1022, ('26) A.L. 41; <i>Chairman, District Board, Monghyr v. Sheodutt Singh</i> (1926) 5 Pat. 476, 98 I.C. 364, ('26) A. P. 438.</p> <p>(v) <i>Seetharama v. Official Receiver</i> (1926) 49 Mad. 849, 97 I. C. 825, ('26) A. M. 994. See also <i>Fakirchand v. Motichand</i> (1883) 7 Bom. 438, 446.</p> <p>(w) (1925) 52 I. A. 22, 6 Lah. 1, 84 I. C. 883, ('25) A. PC. 18, reversing (1922) 3 Lah. 329, 69 I.C. 486, ('23) A.L. 1.</p> <p>(x) <i>Fakirchand v. Motichand</i> (1883) 7 Bom. 438 [Ind. I. Act, 1848, s. 7]; <i>Rangayya v. Thanikachalla</i> (1896) 19 Mad. 74 [Ind. I. Act, 1848, not clear whether s. 7 or s. 30 applied]; <i>Amolak v. Mansukh</i> (1924) 3 Pat. 857, 85 I.C. 88, ('25) A.P. 127 [Prov. I. Act, 1920, s. 2 (1) (d)]; <i>Behari Lal v. Sat Narain</i> (1922) 3 Lah. 329, 69 I.C. 486, ('23) A. L. 1.</p> |
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Para. 522 This decision has now been followed in numerous cases in India under both Acts (y). Though there is no provision in the Provincial Insolvency Act corresponding to sec. 52 (2) (b) of the Presidency-towns Insolvency Act, the same result is reached by holding that the power which a Hindu father has to alienate the whole joint family property for the payment of his debts is "property" within the meaning of sec. 28 (2) of that Act, if not also sec. 2 (d), and that it vests in the Receiver like any other property of the insolvent.

(c) As the *share itself* of the son does not vest in the Official Assignee or Receiver, it may be attached even after the insolvency of the father by a creditor of the father in execution of a decree obtained by him against the father, or against the father and son, in respect of a personal debt of the father, unless it has been previously sold by the Official Assignee or Receiver. After attachment the Official Assignee or Receiver cannot exercise the power of sale as the father himself could not have done it. Where the son's share is attached after the insolvency of the father, the proper procedure is to carry out execution proceedings in combination with the Official Assignee or Receiver so that the entire property may be sold at the same time (z).

(d) As in the case of the father, so in the case of the Official Assignee and Receiver, the power to sell the son's share for paying the father's debts subsists only so long as the family remains joint. After partition the Official Assignee or Receiver cannot sell the son's interest as the father himself could not have done. It has accordingly been held that if the son sues the father for partition of joint family property pending the insolvency of the father, the Official Assignee cannot sell the son's share. The institution of a suit for partition puts an end to the joint family status and with that to the right also of the father to sell his son's share for his debts, and by that means extinguishes the right also of the Official Assignee or Receiver to sell the son's share for the father's debts (a). But though the Official Assignee or Receiver cannot sell the son's share after the institution of a suit for partition, he can institute a suit against the son for realizing debts due to the father's creditors and enforce the decree in such suit by selling

(y) *Seetharama v. Official Receiver* (1926) 49 Mad. 849, 97 I.C. 825, ('26) A.M. 994; *Allahabad Bank, Ltd. v. Bhagwan Das* (1926) 48 All. 343, 92 I.C. 309, ('26) A.A. 343 [Prov. I. Act]; *Parbhulal v. Bhagwan* (1927) 29 Bom. L. R. 473, 102 I.C. 464, ('27) A.B. 412; *Gopal-krishnaya v. Gopalan* (1928) 51 Mad. 342, 111 I.C. 505, ('28) A.M. 479 [Prov. I. Act]; *Shripad v. Basappa* (1925) 49 Bom. 785, 89 I.C. 996, ('25) A.B. 416 [Prov. I. Act]. See also cases cited in above

foot-notes.

(z) *Allahabad Bank, Ltd. v. Bhagwan Das* (1926) 48 All. 343, 92 I. C. 309, ('26) A. A. 262 [Prov. I. Act]; *Gopalakrishnayya v. Gopalan* (1928) 51 Mad. 342, 111 I. C. 505, ('28) A. M. 479; *Shripad v. Basappa* (1925) 49 Bom. 785, 89 I. C. 996, ('25) A. B. 416.
(a) *Re Balusami Ayyar* (1928) 51 Mad. 417, 112 I. C. 541, ('28) A. M. 735. See also *Sita Ram v. Bem Prasad* (1925) 47 All. 263, 84 I. C. 790, ('25) A. A. 221.

the son's share; or he may apply to be joined as a party in the son's suit for partition and by proper procedure can obtain a decree which he can execute against the son's share (b).

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(3) *Insolvency of other coparceners.*—On the insolvency of any other coparcener all that vests in the Official Assignee or Receiver is his separate property and his undivided interest in the joint family property (c).

523. Vesting of rights of action in Official Assignee or Receiver.—As a general rule rights of action which *relate directly to the insolvent's property* and can be turned into assets for the payment of his debts pass to the Official Assignee or Receiver (d).

It follows from the above rule that a right of action in respect of a breach of contract which has resulted in injury *exclusively to the person or feelings of the insolvent* such as a contract to cure or to marry, does not vest in the Official Assignee or Receiver, but remains in the insolvent. Similarly, a right of action in respect of a tort independent of a contract resulting in injury *exclusively to the reputation, person or feelings of the insolvent*, such as defamation, or assault, does not pass to the Official Assignee or Receiver (e). On the other hand a right of action in respect of a tort resulting in injury *exclusively to the property of the insolvent* passes to the Official Assignee or Receiver (f). Similarly a right of action in respect of a contract resulting in injury *exclusively to the insolvent's property* passes to the Official Assignee or the Receiver except in the case of contracts involving personal skill of the insolvent (see para. 510 above). A right of action, whether in respect of a tort or of a breach of contract, resulting in *injuries both to the property and to the person or feelings of the insolvent*, will be split and will pass, so far as it relates to the property, to the Official Assignee or Receiver, and will remain in the insolvent so far as it relates to his person or feelings (g).

Having stated the general rule it remains to consider the exceptions. They are three in number, namely:—

- (a) The right to sue for *personal earnings* acquired by the insolvent after his insolvency and before his discharge, if such earnings are only sufficient for the maintenance of the insolvent and his family, does not vest in the Official Assignee or Receiver.

(b) *Re Balusami Ayyar* (1927) 51 Mad. 417, 443, 467, 468, 112 I. C. 541, ('28) A. M. 735.

(c) *Munna v. Chideraboyina* (1902) 26 Mad. 214, 221.

(d) *Beckham v. Drake* (1849) 2 H. L. C. 579, at pp. 596, 627, 9 E. R. 1213; *Sadodin v. Spiers* (1879) 3 Bom. 437.

(e) *Howard v. Crowther* (1841) 8 M. & W. 601, 151 E. R. 1179; *Beckham v. Drake* (1849) 2 H. L. C. 579,

at pp. 596, 627, 9 E. R. 1213; *Wilson v. United Counties Bank* (1920) 1 A. C. 102; *Rose v. Bucket* (1901) 2 K. B. 449, 454 [trespass]. See also Indian Succession Act, 1925, s. 306.

(f) See *Stanton v. Collier* (1854) 23 L. J. Q. B. 116.

(g) *Wilson v. United Counties Bank* (1920) A. C. 102. Williams on Bankruptcy, 13th ed., p. 259.

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The insolvent alone is entitled to sue for and recover them. See para. 537 below.

- (b) The right to sue for damages for breach, after insolvency, of a *contract for personal service* made before insolvency and remaining unexecuted at the date of insolvency, does not vest in the Official Assignee or Receiver. The insolvent alone is entitled to sue for and recover them. The reason is that a contract for personal service, not being assignable in law, does not pass to the Official Assignee or Receiver; but he is entitled to the fruits of litigation, that is, to the judgment-debt, and he may therefore intervene and apply to be *added* as a party to the suit. See para. 510 above.
- (c) After-acquired property, in cases governed by the Presidency-towns Insolvency Act, does not vest in the Official Assignee until he intervenes. Therefore, until intervention, the insolvent is entitled to maintain a suit in respect of such property. In cases governed by the Provincial Insolvency Act, after-acquired property vests in the Receiver immediately it is acquired by the insolvent and the insolvent is not entitled to maintain a suit in respect of such property at any time. See paras. 535 and 538 below.

524. Suits by undischarged insolvent.—It follows from what is stated above that an insolvent who has not obtained his discharge cannot maintain a suit except in the following cases :—

- (1) for damages in respect of a tort or of a breach of contract resulting in injury exclusively to his person or his feelings ;
- (2) where a tort or a breach of contract results in injuries both to the property and person or feelings of the insolvent, for damages for injury to his person or feelings ;
- (3) for recovery of personal earnings where such earnings are only sufficient for the maintenance of himself and his family ;
- (4) for damages for breach, after insolvency, of a contract for personal service made before insolvency and remaining unexecuted at the date of insolvency ;
- (5) for recovery, in cases governed by the Presidency-towns Insolvency Act, of after-acquired property and for other remedies in respect thereof where the Official Assignee has not intervened.

In cases (1), (2), (3) and (4), the right of action does not vest in the Official Assignee at all. In case (5), the right of action, in cases governed by the Presidency-towns Insolvency Act remains in the insolvent until the

Official Assignee intervenes; in cases governed by the Provincial Insolvency Act, after acquired property vests in the Receiver immediately it is acquired, and the Receiver, and not the insolvent, is entitled to sue in respect thereof.

525. Official Assignee takes insolvent's property subject to all equities.—In every system of bankruptcy law there is an official, be he called an assignee or trustee or by any other name, who by force of the statute is invested with the bankrupt's property. But the property which he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens (*h*). There are, however, cases in which the Official Assignee or Receiver takes by a title superior to that of the insolvent, in other words, cases in which he stands in a better position than the insolvent (see para. 58). Apart from those cases, the broad general principle is that the Official Assignee or Receiver takes the insolvent's property subject to all the equities and liabilities which affected it in the insolvent's hands (*i*). Except where there is an offence against the bankruptcy law, or against some law in favour of creditors, the Official Assignee or Receiver is merely the legal representative of the debtor, with such rights only as the debtor would have had if not insolvent (*j*).

1. *Mortgaged property.*—If the property has been mortgaged, the Official Assignee or Receiver takes it subject to all the rights of the mortgagee including the right to enter into possession of the mortgaged property in default of payment of the mortgage debt (*k*).

2. *Pre-emption.*—If the property is subject to a right of pre-emption by virtue of a custom, the Official Assignee or Receiver takes it subject to that right (*i*).

3. *Liability to perform contracts.*—If an insolvent, under circumstances which are not impracticable under any particular provision connected with his insolvency, enters into a contract with respect to his immovable property for a valuable consideration, that contract binds the Official Assignee or Receiver as much as it binds himself. The Official Assignee or Receiver stands exactly in the same position as that in which the insolvent himself stands and therefore he is bound to perform the contract in

(*h*) *Sheobaran Singh v. Kulsum-un-Nissa* (1927) 54 I. A. 204, 210, 49 All. 367, 101 I. C. 368, ('27) A. PC. 113.

(*i*) *Ex parte Newitt* (1881) 16 Ch. D. 522, 531; *Ex parte Holthausen* (1874) L.R. 9 Ch. App. 722; *Harris v. Truman & Co.* (1882) 9 Q. B. D. 264.

(*j*) *Re Mapleback* (1876) 4 Ch. D. 160, 156.

(*k*) *Hobson v. Gorringe* (1897) 1 Ch. 182 [gas engine]; *Monti v. Barnes* (1901) 1 K. B. 205 [dog grates]; *Ellis v. Glover* (1908) 1 K. B. 388 [fixtures]; *Bagnall v. Villah* (1879) 12 Ch. D. 812 [growing crops].

(*l*) *Sheobaran Singh v. Kulsum-un-Nissa* (1927) 54 I. A. 204, 49 All. 367, 101 I. C. 368, ('27) A. PC. 113.

Para. 525 exactly the same way as the insolvent himself was bound to perform it (*m*). Thus if an insolvent has before his insolvency agreed to sell his property, specific performance may be enforced against the Official Assignee or Receiver, and, if the property is leasehold, he cannot disclaim the contract without disclaiming the lease (*n*). Nonetheless specific performance will not be ordered against the Official Assignee or Receiver if the contract is to buy property or take a lease (*o*). Such contracts, in cases governed by the Presidency-towns Insolvency Act, are the subject of disclaimer

Where an insolvent agrees, before adjudication, to sell his property, and the purchaser having no notice of the adjudication pays the purchase-money to the insolvent *after* adjudication, the Official Assignee or Receiver is not bound to convey the property to the purchaser, except upon the terms of his paying the purchase-money to the Official Assignee or Receiver (*p*).

The Official Assignee or Receiver cannot sue on an illegal agreement any more than the insolvent himself could have done had he not become insolvent (*q*). See para. 509 above.

4. *Goods obtained by insolvent by fraud or sent to him by mistake.*—Where a trader orders goods from a firm, which sends the goods to him acting on the belief that the order has come from a person with whom the firm was acquainted, and whose name resembles that under which the trader carries on business, the trader does not acquire any property in the goods, and if he becomes insolvent, the Official Assignee or Receiver is bound to return the goods to the firm which sent them, unless he is willing to pay the price of the goods (*r*).

Where a vendor sells and delivers goods to a buyer who has no intention at all of paying for them, the agreement is one induced by fraud, and the vendor may, on discovering the fraud, disaffirm the contract and retake the goods, even after notice of the presentation of an insolvency petition (*s*) and after the order of adjudication (*t*). For this the reason is that the Official Assignee or Receiver in such a case acquires the property in the goods subject to the right of the vendor to disaffirm the contract of sale and to retake possession of the goods. Where no such intention is proved, the vendor is not entitled to rescind the contract, and the Official Assignee or Receiver is

(*m*) *Ex parte Holthausen* (1874) L. R. 9 Ch. App. 722, 726, per James, L.J.

(*n*) *Pearce v. Bastable's Trustee* (1901) 2 Ch. 122; *Re Bastable* (1901) 2 K. B. 518; *Re Wait* (1926) W. N. 230.

(*o*) *Holloway v. York* (1877) 25 W.R. 627 [Eng.].

(*p*) *Ex parte Rabbidge* (1878) 8 Ch. D.

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(*q*) *Nicholson v. Gooch* (1856) 5 El. & Bl. 999, 119 E. R. 752; *Re Mapleback* (1876) 4 Ch. D. 150; *Shoolbred v. Roberts* (1900) 2 Q. B. 497.

(*r*) *Re Reed* (1876) 3 Ch. D. 123.

(*s*) *Re Eastgate* (1905) 1 K. B. 465.

(*t*) *Tilley v. Bowman* (1910) 1 K. B. 745.

entitled to retain the goods as against the vendor, the latter being only entitled to prove for the price (u).

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5. *Detinue*.—An unsatisfied judgment in *detinue* does not change the property in the detained goods. *A* who has hired a chattel from *B*, wrongfully refuses to return it to *B* though required by *B* to do so. *B* sues *A* for the recovery of the chattel, and, alternatively, for the value thereof, and judgment is passed for *B*. Such a judgment unsatisfied does not operate to transfer the property in the chattel to *A*, and if *A* becomes insolvent, and the chattel passes into the hands of the Official Assignee or Receiver, he is bound to return it to *B*, the true owner (v), unless *B* elects to take proceeds in *A*'s insolvency for the ascertained value of the chattel (w).

526. Duty of Official Assignee to do what is honourable: Rule in *Ex parte James* (x).—“A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the Court will order him to act in an honourable and high-minded way” (y). It has accordingly been held in England that the ordinary rule as between litigant parties, that money paid under a mistake of law cannot be recovered, does not apply to a payment made under such a mistake to the trustee in bankruptcy. When the mistake is discovered the Court will direct him to refund the money, if it is still in his hands (z), and if it has been applied in the payment of dividends to the creditors under the bankruptcy, the Court will direct the trustee to repay the amount out of other moneys coming to his hands and applicable to the payment of dividends to the creditors (a). The leading case on the subject is *Ex parte James* (b). In that case a trustee in bankruptcy to whom an execution creditor acting under what proved to be a mistaken view of the law voluntarily paid the proceeds of his execution was ordered to refund the money so paid notwithstanding that he could not by law be compelled to do so. The ground of the decision is thus stated by James, L.J.: “A trustee in bankruptcy is an officer of the Court. The Court, then, finding that he has in his hands money which in equity (c) belongs to some one else, ought to set an example to the world by paying it to

(u) *Ex parte Whittaker* (1875) L.R. 10 Ch. App. 446.

(v) *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547; *Ex parte Drake* (1877) 5 Ch. D. 886; *Re Gunsbourg* (1920) 2 K. B. 426, 436.

(w) *Re A Debtor* (1907) 14 Mans. 198.

(x) (1874) L. R. 9 Ch. App. 609.

(y) *Ex parte Simmonds* (1885) 16 Q. B. D. 308, 312, per Lord Esher, M. R.

(z) *Ex parte James* (1874) L. R. 9 Ch. App. 609.

(a) (1885) 16 Q. B. D. 308, *supra*; *Re Brown* (1886) 32 Ch. D. 597 [payment to trustee of money in excess of share of bankrupt legatee]; *Re Rhoades* (1899)

2 Q. B. 347.

(b) (1874) L. R. 9 Ch. App. 609.

(c) In saying that the trustee had money in his hands which “in equity” belonged to some one else, the learned Lord Justice did not mean that a Court of Equity would, as between litigants, hold that the money belonged to the supposed claimant, but he meant money which in point of moral justice and honest dealing belongs to some one else: see *Re Thellusson* (1919) 2 K. B. 735, 746; *Re Tyler* (1907) 1 K. B. 865, 873.

Para. 526 the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." In *Ex parte Simmonds* (d), the principle was laid down by Lord Esher, M.R., in the following terms: "A rule has been adopted by Courts of law for the purpose of putting an end to litigation that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order, that is, to put an end to litigation. But James, L.J., laid it down in *Ex parte James* that, although the Court will not prevent a litigant party from acting in this way, it will not do so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law."

The principle laid down in the above cases is not confined to the case of money paid to the trustee in bankruptcy under a mistake of law. Thus where a bankrupt's wife paid during the bankruptcy and up to his death, to the trustee's knowledge, the premiums on a policy which the bankrupt had mortgaged, it was held that the trustee could not take the surplus, without repaying to the wife the sums so paid (e). In the course of his judgment, Buckley, L.J., said: "She may not have an enforceable claim, but as matter of justice it cannot be right, when the time comes for the payment of the moneys due on the policy, to allow the trustee to turn round and say, 'I knew you were keeping down the premiums, but I shall take the policy moneys, and you shall go without the money you have paid'." The principle has no application where premiums are paid by the debtor himself on a policy on his life which he has not disclosed to his trustee. In such a case the legal representative of the bankrupt is not entitled to payment of the amount of the premiums paid by the bankrupt (f); here the dishonesty, if any, was on the part of the debtor himself in not disclosing the existence of the policy to the trustee (g). Similarly where a mortgagee, after notice of an available act of bankruptcy, paid in good faith, certain sums to the mortgagor's creditors by way of compensation, believing that he was entitled under his mortgage to add the money so paid to his security, it was held that he was not entitled, in the mortgagor's bankruptcy, to treat those sums as added to his security (h). It could not be suggested that there was any sort of a moral obligation upon the trustee in bankruptcy to allow the mortgagee's claim (i).

(d) (1885) 16 Q. B. D. 308, 312.

(e) *Re Tyler* (1907) 1 K. B. 865.

(f) *Tapster v. Ward* (1909) 101 L. T. 503; *Re Stokes* (1919) 2 K. B. 256.

(g) See *Re Thellusson* (1919) 2 K. B. 735, 750.

(h) *Re Hall* (1907) 1 K. B. 875.

(i) See *Re Thellusson* (1919) 2 K. B. 735, 762.

The true principle in all such cases is that the Court in Bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the Court where such insistence would produce an unjust and dishonest result (j). If, however, there be nothing contrary to natural justice or nothing unconscionable on the part of the trustee or on the part of the Court if the trustee is allowed to retain or recover money for the benefit of the general body of creditors, there is no occasion for the exercise of its disciplinary control by the Court, and the Court will allow the trustee to claim the full benefit of the rights given to him by the statute (k). Thus if *A* draws a cheque in payment of money lost by him to *B* on a horse race, and *B* receives the amount of the cheque, *A* is entitled to recover back the amount from *B* under the English law, the consideration for the cheque being illegal. If *A* becomes bankrupt, the trustee in bankruptcy also is entitled to recover the amount from *B*, there being nothing dishonourable, improper or unconscionable on the part of the trustee in seeking to enforce payment of a statutory debt in order to collect the asset and distribute it among the creditors of the bankrupt (l). In the case last cited the Judge in the Court below thought that, there being no special circumstances in the case, it was neither honourable nor high-minded for the trustee to bring or maintain such an action. The Court of Appeal took a different view and held that it was in no way dishonest or dishonourable for the trustee in such a case to enforce the debt, though it might have been dishonourable on the part of the bankrupt himself to do so. This case is a striking example of the difficulty of applying the principle to individual cases. The difficulty arises from the fact that "legal rights can be determined with precision by authority, but questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men" (m).

527. Sale of a mere right to sue.—It forms no part of the duties of the Official Assignee or Receiver either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation. Sales by the Official Assignee or Receiver of lands which have been for a long time in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in sec. 6 of the Transfer of Property Act, 1882, against the transfer of a mere right to sue, they are open to the same objections, and are strongly to be deprecated (n).

(j) *Re Thellusson* (1919) 2 K. B. 735, 756, per Duke, L.J.

(k) *Re Wigzell* (1921) 2 K. B. 835.

(l) *Scranton's Trustee v. Pearce* (1922) 2 Ch. 87, 125.

(m) Per Salter, J., in *Re Wigzell* (1921) 2 K. B. 835, at p. 845.

(n) *Chokulingam Chetty v. Seethai Acha* (1928) 55 I. A., 7, 6 Rang. 29, 107 I. C. 237, ('27) A. P.C. 252 [sale for Rs. 580 of lands valued by the plaintiff purchaser himself at Rs. 3,00,000].

2. After-acquired Property.

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528. What is after-acquired property.—The insolvent may acquire property *after* adjudication and before discharge. He may carry on business after insolvency, and, in the course of business, he may acquire rights and he may acquire property. He may also acquire property by inheritance or by way of gift (o) or under a settlement or a will. This subject may be divided into five classes, namely:—

- (1) After-acquired property in cases governed by the Presidency-towns Insolvency Act.
- (2) After-acquired property in cases governed by the Provincial Insolvency Act.
- (3) Personal earnings.
- (4) Salary, and income from other sources.
- (5) Subsequent trade creditors and estoppel of Official Assignee.

(1) *After-acquired property under Presidency-towns Insolvency Act.*

529. (1) After-acquired property under Presidency-towns Insolvency Act [s. 52 (2) (a)].—Property acquired by the insolvent after adjudication and before discharge does not vest in the Official Assignee immediately on the making of the order of adjudication like other property of the insolvent. The Official Assignee acquires no rights in such property unless he intervenes on behalf of the insolvent's estate. If he does not intervene, and the insolvent transfers the property to another who takes it in good faith and for value, the transferee acquires a good title to it. If he does intervene, the property vests indefeasibly in him, and he cannot subsequently withdraw his intervention. He cannot, after intervention, divest the property from himself and re-vest it in the insolvent (p).

By sec. 52 (2) (a) of the Presidency-towns Insolvency Act (q) corresponding with sec. 44 of the Bankruptcy Act, 1883, it is provided that the property of the insolvent divisible among his creditors "shall comprise all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before discharge." Under sec. 17 of that Act "the whole of the property of the insolvent vests in the Official Assignee" on the making of the order of adjudication. From the words of sec. 17 read by itself it might be supposed that both those kinds of property vest absolutely in the Official Assignee and in precisely the same manner. An

(o) See *Re Ackrill* (1895) 18 Mad. 25. | (q) See Prov. I. A., s. 28 (4).
(p) *Hill v. Settle* (1917) 1 Ch. 319.

exception, however, has apparently been engrafted upon the section, and a distinction has been drawn as regards the manner of vesting between the two kinds of property (r). Property which belongs to the insolvent at the time of his insolvency vests in the Official Assignee immediately the adjudication is made, and no claim or intervention on his part is necessary to complete his title. But property acquired by the insolvent after adjudication does not vest in the Official Assignee until he intervenes, that is, takes active steps to assert his title thereto; the vesting, in other words, is postponed until he intervenes on behalf of the insolvent's estate. In *Morgan v. Knight* (s), Erle, C.J., said: "The result of the cases is not only that he (the bankrupt) may acquire property, but that he may hold it against all the world except the trustee in bankruptcy." Until the trustee intervenes, all transactions of a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without the knowledge of the bankruptcy, are valid against the trustee (t). On the same principle money received by an undischarged bankrupt and paid away for value cannot be followed by the trustee though the trustee could have intercepted the money before payment and required it to be paid to him. If it were otherwise, the trustee could as well recall from a butcher or baker money paid to him by a bankrupt out of money acquired by him after his bankruptcy (u). The trustee, if he does not intervene, has no power retrospectively to disclaim what has otherwise been validly done by the bankrupt (v). If the trustee does intervene, the bankrupt's right is gone, and the property vests absolutely in the trustee from the moment of intervention (w).

530. Rule in *Cohen v. Mitchell*.—The law on the subject was laid down in the following terms in *Cohen v. Mitchell* (x):—

"Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without the knowledge of the bankruptcy, are valid against the trustee."

It is clear from the above rule that to render a transaction by a bankrupt in respect of his after-acquired property before the intervention of the trustee

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| <p>(r) Per Fry, L.J., in <i>Cohen v. Mitchell</i> (1890) 25 Q. B. D. 262, 268; per A. L. Smith, L.J., in <i>Re Clark</i> (1894) 2 Q. B. 393, 405.</p> <p>(s) (1864) 15 C. B. (N. S.) 669, 677; <i>Webb v. Fox</i> (1797) 7 T. R. 391; <i>Sriramulu v. Andalammal</i> (1907) 30 Mad. 145, 149.</p> <p>(t) <i>Cohen v. Mitchell</i> (1890) 25 Q. B. D. 262, 267 [mortgage of suit claim]; <i>Drayton v. Dale</i> (1823) 2 B. & C.</p> | <p>293, 107 E. R. 393; <i>Keraknoos v. Brooks</i> (1860) 8 M. J. A. 339 [mortgage of stock-in-trade].</p> <p>(u) <i>Ex parte Dewhurst</i> (1871) L. R. 7 Ch. App. 185.</p> <p>(v) <i>Re Shine</i> (1892) 1 Q. B. 522.</p> <p>(w) <i>Kitchen v. Bartsch</i> (1805) 7 East. 53, 103 E. R. 21; <i>Macleod v. B. B. & C. I. Ry. Co.</i> (1905) 7 Bom. L. R. 618, 621.</p> <p>(x) (1890) 25 Q. B. D. 262, 267.</p> |
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valid as against him, it is necessary that it should have been entered into with a person dealing with the bankrupt (1) *bona fide*, and (2) for value. It will be seen from the wording of the rule that the stress of *bona fides* is laid entirely and solely on the person dealing with the bankrupt; and if he has dealt in good faith, the question of whether the bankrupt, as between himself and his creditors, is also dealing in good faith is immaterial (y). If the transaction is entered into by such person in good faith and for value, it does not matter whether or not he had knowledge of the bankruptcy (z), or whether or not the trustee was aware of the existence of the after-acquired property (a). A party dealing *bona fide*, that is, "honestly", and for value with a bankrupt, is under no obligation, although he knows of the bankruptcy, to go to the trustee in bankruptcy to make inquiries (b). The transaction must not only be *bona fide*, but also for value (c). The reason of the rule is that if the trustee allows the bankrupt to carry on business and acquire property, those who deal with the bankrupt *bona fide* and for value have a right to say that upon the trustee's intervention he is not to insist upon his title to their detriment (d).

The rule in *Cohen v. Mitchell* has been followed in India. It has accordingly been held that a mortgage by the insolvent of his after-acquired property (e), or an assignment by him of a decree obtained by him for personal services rendered to the defendant after adjudication (f), is valid against the Official Assignee, if the transfer was made before the intervention of the Official Assignee. In certain cases, the possession of after-acquired property by the insolvent may be adverse to the Official Assignee so as to bar the title of the latter by lapse of time (g).

531. To what property the rule applies.—The rule in *Cohen v. Mitchell* (h) applies to all after-acquired movables. It also applies to after-acquired *choses in action*, such as a legacy in the hands of the trustees of a will, or an interest acquired after bankruptcy in trust funds settled before bankruptcy and still in the hands of the trustees of the settlement (i). The rule also applies to after-acquired leasehold (j).

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| <p>(y) <i>Cohen v. Mitchell</i> (1890) 25 Q.B.D. 262, 267.</p> <p>(z) <i>Cohen v. Mitchell</i>, <i>supra</i>.</p> <p>(a) <i>Hunt v. Frupp</i> (1898) 1 Ch. 675.</p> <p>(b) <i>Hunt v. Frupp</i>, <i>supra</i>.</p> <p>(c) <i>Re Bennett</i> (1907) 1 K. B. 149; <i>Re Behrend's Trust</i> (1911) 1 Ch. 687 [marriage settlement of after-acquired property]; <i>Hosack v. Robins</i> (No. 2), (1918) 2 Ch. 339.</p> <p>(d) <i>Re Rogers</i> (1894) 1 Q. B. 425, 432, per Vaughan Williams, J. See <i>Herbert v. Sayer</i> (1844) 5 Q. B. 965, 114 E. R. 1512.</p> | <p>(e) <i>Alimuhammad v. Vadilal</i> (1919) 43 Bom. 89, 53 I.C. 197.</p> <p>(f) <i>Chhote Lal v. Kedar Nath</i> (1924) 46 All. 565, 84 I.C. 289, ('24) A. A. 703.</p> <p>(g) <i>Kristocomul v. Suresh Chunder</i> (1882) 8 Cal. 556.</p> <p>(h) (1890) 25 Q. B. D. 262.</p> <p>(i) See <i>Hunt v. Frupp</i> (1898) 1 Ch. 675; <i>Re Behrend's Trust</i> (1911) 1 Ch. 687; <i>Ex parte Official Receiver</i> (1899) 1 Q. B. 688.</p> <p>(j) <i>Re Clayton and Barclay's Contract</i> (1895) 2 Ch. 212.</p> |
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In England it was held prior to the Bankruptcy Act, 1913, that the rule in *Cohen v. Mitchell* did not apply to real property (*k*). This did not mean that an undischarged bankrupt could not transfer his real property at all; he could mortgage or sell it, and give a good title to the mortgagee or purchaser, but he could not give a good title *as against the trustee in bankruptcy*, the trustee's right on intervention *not being subject as regards real property* to the rights even of *bona fide* transferees for value. This distinction between personalty and realty drawn in the English cases was done away with in England by sec. 11 of the Bankruptcy Act, 1913, now reproduced in sec. 47 of the Bankruptcy Act, 1914. That section gives a statutory recognition to the decision in *Cohen v. Mitchell*, and extends the protection conferred by it to real estate. The result is that as in the case of personalty, so in the case of realty, an undischarged bankrupt may now transfer realty acquired by him after his bankruptcy to a *bona fide* transferee for value, and give a good title to such transferee *even as against the trustee in bankruptcy* (*l*).

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In India there is a conflict of opinion whether the rule in *Cohen v. Mitchell* applies to immovable property. If it does, a transfer by an insolvent of immovable property acquired after adjudication and before discharge to a *bona fide* purchaser for value before the intervention of the Official Assignee is binding on the Official Assignee. If it does not, the transfer is void as against the Official Assignee. The High Court of Madras has held that the rule in *Cohen v. Mitchell* does not apply to immovable property (*m*). On the other hand, it has been held by the High Courts of Bombay (*n*), Calcutta (*o*), Allahabad (*p*), and Rangoon (*q*), that it does so apply. All the High Courts, however, are unanimous in holding, following *Herbert v. Sayer* (*r*), that unless the Official Assignee has intervened, it is competent to the insolvent (*s*), his legal representatives (*t*), and his assigns (*u*), to *maintain a suit* for the recovery of after-acquired immovable property or for any other relief in respect thereof against a stranger, and that the Official Assignee is not a necessary party to such suit. "The Official Assignee himself and of course an assignee from him may dispute the title the insolvent has, or has purported to give, to his after-acquired property; no

- (*k*) *Re New Land Development Association* (1892) 2 Ch. 138;
Bird v. Philpott (1900) 1 Ch. 822;
Official Receiver v. Cooke (1906) 2 Ch. 661.
- (*l*) *Dyster v. Randall & Sons* (1926) Ch. 932.
- (*m*) *Rowlandson v. Champion* (1804) 17 Mad. 21; *Sriramulu v. Andalammal* (1907) 30 Mad. 145, 149.
- (*n*) *Alimahomed v. Vadilal* (1919) 43 Bom. 890, 53 I. C. 197.
- (*o*) *Kristocomul Mitter v. Suresh Chunder Deb* (1882) 8 Cal. 556

- [property acquired by inheritance].
- (*p*) *Chhole v. Kedar Nath* (1924), 46 All. 565, 84 I. C. 289, ('24) A. A. 703.
- (*q*) *Official Assignee v. N. P. A. K. Chettyar* (1927) 5 Rang. 229, 103 I. C. 174, ('27) A. R. 190.
- (*r*) (1844) 5 Q. B. 965, 114 E. R. 1512.
- (*s*) *Sriramulu v. Andalammal* (1907) 30 Mad. 145.
- (*t*) *Fatimabibi v. Fatimabibi* (1892) 16 Bom. 452.
- (*u*) *Dasarathy Sinha v. Mahamulya Ash* (1920) 47 Cal. 961, 60 I. C. 977.

Para. 531 stranger may dispute that title except upon condition that he allege and prove that the Official Assignee has intervened" (v). See para. 535 below.

It was also held in England prior to the Bankruptcy Act, 1913, that the rule in *Cohen v. Mitchell* was meant only for the protection of persons who had dealt with the bankrupt in the ordinary course of business, and had been paid by the bankrupt with money acquired by him in his business, where the bankrupt was carrying on business without interference by the trustee in bankruptcy (w); in other words, the rule applied only to assignments of subsequent *acquisitions in trade* made in favour of subsequent *trade creditors*. This view was adopted by Best, J., in a Madras case (x), and by Strachey, J., in a Bombay case (y). In a subsequent Bombay case, Jenkins, C. J., hesitated to say that the rule was limited in its application to subsequent acquisitions in trade (z). In the latest Bombay case on the subject, the High Court held that the reason of the rule in *Cohen v. Mitchell* did not compel the recognition of any restriction as to the nature of the property in its application (a). In that case an undischarged insolvent purchased a house, and on the same day he mortgaged the property to pay the purchase-money. It was held that the mortgage, having been made before the intervention of the Official Assignee, was valid as against the Official Assignee. In England this limitation also has been done away with by sec. 11 of the Bankruptcy Act, 1913, now sec. 47 of the Bankruptcy Act, 1914. Sec. 47 of the Act of 1914 is in the following terms:—

"(1) All transactions by a bankrupt with any person dealing with him bona fide and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

"This sub-section shall apply to transactions with respect to real property completed before the first day of April nineteen hundred and fourteen, in any case where there has not been any intervention by the trustee before that date.

"For the purposes of this sub-section, the receipt of any money, security, or negotiable instrument, from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of, a bankrupt

(v) (1920) 47 Cal. 961, 971, 60 I. C. 977, *supra*.

(w) *Re Rogers* (1891) 8 Mor. 236, 241; *Re New Land Development Association* (1892) 2 Ch. 138, at p. 147, per Kay, L. J.

(x) *Rowlandson v. Champion* (1894)

17 Mad. 21, 88.

(y) *Naoroji v. Kazi Sidick Mirza* (1896) 20 Bom. 636, 653-654.

(z) *Macleod v. B. B. & C. I. Ry. Co.* (1905) 7 Bom. L. R. 618, 621.

(a) *Alimuhammad v. Vadilal* (1919) 43 Bom. 890, 905, 53 I. C. 197.

by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.

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“(2) Where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then, unless the banker is satisfied that the account is on behalf of some other person it shall be his duty forthwith to inform the trustee in the bankruptcy or the Board of Trade of the existence of the account, and thereafter he shall not make any payments out of the account, except under an order of the Court or in accordance with instructions from the trustee in the bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee ”.

It is highly desirable that there should be uniformity of law on this subject in India. The Madras High Court is the only Court which has held that the rule in *Cohen v. Mitchell* has no application to immovable property. Under the Provincial Insolvency Act there is a conflict of opinion whether the rule applies at all to cases under that Act (see para. 536 below). It is suggested that both the Acts may be amended on the lines of sec. 47 of the Bankruptcy Act, 1914.

532. Agreements in fraud of bankruptcy law.—An agreement made by the insolvent before discharge, without notice to the Official Assignee and his other creditors, which has the effect of giving a particular creditor more than he would be entitled to receive on a rateable distribution, and by which the creditor in return agrees not to oppose his discharge, is contrary to the policy of the bankruptcy law, and is therefore void. The rule in *Cohen v. Mitchell* does not apply to such an agreement (b).

533. Second bankruptcy.—(1) Prior to the Bankruptcy Act, 1914, it was held that the rule in *Cohen v. Mitchell* (b1) had no application to the case of claims *inter se* of trustees of successive bankruptcies. Thus if an undischarged bankrupt traded without the knowledge of the trustee, and then became bankrupt a second time, it was held that properties acquired by him in the course of his trading since the first bankruptcy should be treated as assets in the first bankruptcy, and that the creditors in the second bankruptcy were entitled to nothing until all the debts and expenses under the first bankruptcy were paid in full. The ground on which these decisions were based was that the trustee in the second bankruptcy could not be said to be a *bona fide* assignee for value within the meaning of that rule (c). It was also held that if there was a surplus after payment in full of the debts and expenses under the first bankruptcy, the trustee in the second

(b) *Nooraji v. Kazi Sidick Mirza* (1896) 20 Bom. 636, 646; *Mohanlal v. Harilal* (1925) 27 Bom. L. R. 419, 87 I.C. 929, (25) A.B. 346.

(b1) (1890) 25 Q. B. D. 202.

(c) *Ex parte Ford* (1876) 1 Ch. D. 521; *Re Clark* (1894) 2 Q. B. 393, 399.

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bankruptcy was entitled to such surplus only in so far as the bankrupt had not effectually dealt with it before the date of the second bankruptcy (*d*). These decisions were followed by the High Court of Bombay in a case which arose under the Indian Insolvency Act, 1848 (*e*). In England it is now provided by sec. 39 (1) of the Bankruptcy Act, 1914, that in the event of a second or subsequent bankruptcy, any property acquired by a bankrupt since the first adjudication, which at the date of the presentation of the subsequent petition has not been distributed among the creditors in the first bankruptcy, is to vest in the trustee in the second bankruptcy, but any unsatisfied balance of the debts provable in the first bankruptcy may be proved in the subsequent bankruptcy by the trustee. This seems to be a more equitable rule, and it was followed by the High Court of Calcutta in a recent case (*f*). In this connection it may be observed that there is nothing like the common law of bankruptcy, and it is open to the Indian Courts, in cases not covered by the Insolvency Acts, to follow what rule seems most equitable to them.

534. Effect of intervention of Official Assignee.—In *Cohen v. Mitchell* (*f*1) the bankrupt carried on business in buying and selling agricultural machines. He continued the business after his bankruptcy, and to enable him to carry on the business he borrowed several sums of money from the plaintiff. Some of the machines were afterwards seized by *F*. The bankrupt brought an action against *F* for wrongful conversion of the machines so seized. To enable him to carry on the action he borrowed further sums of money from the plaintiff and assigned the cause of action to him as security for the moneys due. The action resulted in a verdict for £120. The trustee in bankruptcy, before the money was paid over by *F* under the judgment, intervened and demanded it of *F*, as part of the bankrupt property. The plaintiff also claimed the amount under his assignment. *F* interpleaded and paid the money into Court. An issue was tried whether the plaintiff who was the assignee of the cause of action or the trustee in bankruptcy was entitled to the money. It was held that the assignment was valid against the trustee, and that the plaintiff was entitled to the money. In the course of the judgment Fry, L.J., said :—

“ I think, therefore, in this case there was in point of fact a dealing with the cause of action, which was entered into in good faith upon the part of the person who was receiving the assignment, as well as, in this case, on the part of the bankrupt who assigned ; and that being so, the intervention of the trustee had not invalidated the assignment, which was good at the time it was made. Now if the trustee had desired to intervene when the bankrupt was carrying on his business, he might probably have acquired

(*d*) *Bird v. Philpott* (1900) 1 Ch. D. 822.

(*e*) *Dossa Gopal v. Bhanji* (1902) 26 Bom. 171.

(*f*) *Re J. M. Gregory* (1927) 54 Cal. 853,

106 I.C. 326, ('28) A.C. 50. See
Ex parte Bourne (1826) 2 Ge. &
Jam. 137, 141.

(*f*1) (1890) 25 Q. B. D. 262.

a right to these very machines. He might have taken the machines themselves if they were in the possession of the bankrupt, and have taken them out of his possession and taken them into his own; or he might even at a later date, when the action had begun, and before the assignment, have intervened and insisted upon having the conduct of the action and making the action his own, after which no assignment could validly have been made of the cause of that action. Again, if no assignment had been made but a verdict had been recovered, he might before the payment of the money have intervened. But he did none of these things. I think, therefore, that effect must be given to the transaction of the bankrupt with a person who acted bona fide and with no fraudulent intention”.

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535. After-acquired property and right of action.—There are certain cases in respect of after-acquired property in which the insolvent alone is entitled to sue. The right of action in those cases does not vest in the Official Assignee and he is not entitled to sue. Those cases are discussed in paragraphs 510 and 537.

In all other cases relating to after-acquired property the Official Assignee may intervene and himself institute a suit; but until he intervenes, the insolvent is entitled to maintain the suit. It has thus been held that the insolvent may institute the following suits:—

- (a) suit on any contract made with him after insolvency (i);
- (b) suit for trover or detinue in respect of after-acquired movables (j);
- (c) suit for specific performance of a contract relating to after-acquired immovable property, or for recovery of such property (k). See para. 531, p. 363 above.

If the insolvent has obtained a decree in respect of after-acquired property, and the Official Assignee intervenes before the insolvent has assigned the judgment-debt, the judgment-debt vests in the Official Assignee, and the insolvent can take no further proceedings in respect of the debt (l).

Security for costs.—An undischarged insolvent suing in respect of after-acquired property is not required to give security for costs (m).

(2) After-acquired property under Provincial Insolvency Act.

536. (2) After-acquired property under Provincial Insolvency Act [Prov. I. A., s. 28 (4)].—There is only one point of difference as to after-acquired property between the Presidency-towns Insolvency

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| <p>(i) <i>Herbert v. Sayer</i> (1844) 5 Q. B. 965, 114 E. R. 1512; <i>Jameson v. Brick & Stone Co., Ltd.</i> (1878) 4 Q. B. D. 208; <i>Murray v. East Bengal Mahajan Flotilla Co., Ltd.</i> (1919) 48 Cal. 156, 48 I. C. 622.</p> <p>(j) <i>Fowler v. Down</i> (1797) 1 B. & P. 44, 126 E. R. 769; <i>Morgan v. Knight</i> (1864) 15 C. B. (N. S.) 660, (1864) 33 L. J. C. P. 168,</p> | <p>143 E. R. 947; <i>Fyson v. Chambers</i> (1837) 9 M. & W. 460 152 E. R. 195.</p> <p>(k) <i>Dyster v. Randall & Sons</i> (1926) 1 Ch. 932 [specific performance].</p> <p>(l) <i>Ex parte Carter</i> (1876) 2 Ch. D. 806.</p> <p>(m) <i>Cook v. Wellock</i> (1890) 24 Q. B. D. 658; <i>Murray v. East Bengal Mahajan Flotilla Co., Ltd.</i> (1919) 48 Cal. 150, 48 I. C. 622.</p> |
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Para. 536 Act and the Provincial Insolvency Act, and that is as to the time when such property vests under the Acts. Sec. 28 (4) provides that all property acquired by the insolvent after adjudication and before discharge shall "forthwith" vest in the Receiver. The word "forthwith" does not occur in sec. 52 (2) (a) of the Presidency-towns Insolvency Act. The High Court of Rangoon has held, relying on the word "forthwith," that the rule in *Cohen v. Mitchell* (m1) [para. 530] does not apply in cases governed by the Provincial Insolvency Act, and that property acquired by the insolvent after insolvency vests in the Court or in the Receiver from the moment when it is acquired. In the course of the judgment it was said: "It seems to us that the insertion of the word 'forthwith' by the legislature in sec. 28 (4) was to sweep away the Court's attempt to postpone the vesting. In view of the specific and clear words of the sub-section we are unable to apply the principle of *Cohen v. Mitchell* to the present case, as to do so, in our opinion, would be to nullify the express direction of the legislature. Hard cases may no doubt arise where the Court or the Receiver has taken no action and property has exchanged hands and been acquired by bona fide transferees without notice of the insolvency. But the remedy does not lie with the Courts, but rather with the legislature, and if it thinks well it can imitate the English statute of 1914, section 47" (n). It has similarly been held by the Judicial Committee that any property acquired by or devolving on an undischarged insolvent vests in the Court or in the Receiver *as from the date of acquisition or devolution* (o). In a Bombay case governed by the Provincial Insolvency Act, it was held that the rule in *Cohen v. Mitchell* applied to after-acquired property, and that it did not vest in the Receiver until he intervened (p). This decision has been followed by the Patna High Court (q). These decisions, it is submitted, are erroneous.

The principle of the decision in *Cohen v. Mitchell* is that property acquired by the bankrupt after the date of adjudication and before his discharge does *not* vest in the trustee in bankruptcy *forthwith*, but that the vesting is *postponed* until the trustee intervenes, and until then the bankrupt can deal with the property and give a good title to persons who deal with him *bona fide* and for value. "That," as observed by an eminent judge, "is a very beneficial and a very just rule, as regards the rights of third parties dealing bona fide and for value with the bankrupt after his bankruptcy" (r). It is therefore difficult to understand why a deliberate departure should have

(m1) (1890) 25 Q. B. D. 262.

(n) *Ma Phaw v. Maung Ba Thaw* (1926) 4 Rang. 125, 91 I.C. 221, ('26) A.R. 179.

(o) *Kala Chand v. Jagannath* (1927) 51 I. A. 190, 54 Cal. 595, 101 I.C. 442, ('27) A. P.C. 108.

(p) *Nagindas v. Ghelabhai* (1920) 44 Bom. 673, 56 I. C. 449. See

Gauri Shankar v. R. J. DeCruze (1926) 1 Luck. 313, 92 I.C. 673, ('27) A. D. 22, where *Nagindas's* case is commented upon.

(q) *Jagdish Narain Sing v. Mussamat Ramsakal Kuer* (1929) 8 Pat. 478, 118 I.C. 465, ('29) A.P. 97.

(r) *Re Clark* (1894) 2 Q. B. 393, 409.

been made by the legislature in enacting the provisions of sec. 28 (4) of the Provincial Insolvency Act, unless it was thought that in places outside the Presidency-towns fraud was so rampant that, under the guise of a *bona fide* transfer for value, after-acquired property would be transferred *benami* to the prejudice of the insolvent's creditors.

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(3) *Personal earnings.*

537. (3) Personal earnings.—Wages and other moneys earned by the bankrupt by mere personal labour and exertions constitute his “personal earnings.” It was at one time supposed that the personal earnings of a bankrupt did not vest in the trustee at all, but that view is no longer tenable, and it is now settled that the personal earnings of a bankrupt after adjudication and before discharge pass like any other property to the trustee, except such part of them as is necessary for the maintenance of the bankrupt and his family. The leading case on the subject is *Re Roberts* (s). In that case the Court of Appeal, after an exhaustive review of the earlier decisions, laid down that there is “no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his personal support does not belong to his trustee. No such doctrine can be maintained in the face of sec. 44 (s1). After bankruptcy and before his discharge whatever property a bankrupt acquires belongs to his trustee save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors except to the extent necessary to support himself, and his wife and family.”

If such earnings are only sufficient for the necessary support of the insolvent and his family, nothing vests in the Official Assignee, and the insolvent alone is entitled to sue for and recover them (t). The Official Assignee is not entitled to intervene and claim them for the benefit of the creditors.

If such earnings are more than sufficient for the maintenance of the insolvent and his family, the insolvent is entitled to sue for and recover them, if the Official Assignee does not intervene (u). In that event what is recovered by the insolvent beyond what is necessary to support himself and his family will pass to the Official Assignee, if the Official Assignee intervenes and claims it (v). If the insolvent has commenced an action for recovery of the personal earnings, and the Official Assignee intervenes during the course of the action, the proper course is to add the Official Assignee as plaintiff (w).

(s) (1900) 1 Q. B. 122; *Re Graydon* (1896) 1 Q. B. 417; *In the matter of C. M. J. Donaghue* (1895) 19 Bom. 232, 236.
(s1) Now B.A., 1914, s. 38 corresponding to P.-t. I. A., s. 52, and Prov. I. A., s. 28.

(t) *Affleck v. Hammond* (1912) 3 K. B. 162.
(u) *Jameson v. Brick & Stone Co., Ltd.* (1878) 4 Q. B. D. 208.
(v) *Re Roberts* (1900) 1 Q. B. 122, 129.
(w) *Emden v. Carte* (1881) 17 Ch. D. 169, and on appeal, p. 768.

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There are *dicta* in some cases to the effect that nothing could be in the nature of personal earnings unless there was an element of periodicity in them, and that lump sums arising at indefinite periods—windfalls, so to speak—or special prizes were not personal earnings, and they passed *in their entirety* to the trustee in bankruptcy (x). These dicta were disapproved in a subsequent case, where it was held that a lump sum earned by an insolvent commission agent under a commission note, should he be successful in procuring a specific loan, was the “personal” earnings of the insolvent. Dealing with the question, Buckley, L.J., said: “I confess myself I am unable to understand the ground upon which money which is the result of the personal labour of the bankrupt is not ‘personal’ earnings merely because the bankrupt does not get employment more or less continuous with the result that there is no periodicity in the payments made to him. If this were so, the money paid to a village carpenter who only gets an occasional job would not be his personal earnings” (y). In a Bombay case, however, it was held that commission earned by an insolvent in respect of policies of insurance effected through him did not constitute his personal earnings (z). This decision is of doubtful authority.

538. Profits of trade or business.—“Personal earnings,” as has been stated above, do not pass absolutely to the Official Assignee. Such earnings must be distinguished from profits of trade or business. The profits of a *trade or business* carried on by the insolvent after insolvency, even though the business is of a character which involves a large amount of personal skill and attention by the insolvent, are not “personal earnings,” and they pass *absolutely* to the Official Assignee (a). Thus the earnings of a surgeon-dentist (b), a surgeon-apothecary who as apothecary sells medicines (c), a painter who supplies materials and labour (d), an architect who prepares and sells plans and employs clerks (e), a furniture broker who removes goods, employs men and vans and supplies packing cases (f), and of a surveyor and assessment specialist who carries on his business with a staff of clerks (g), are all profits of trade or business, and not “personal” earnings, and they pass absolutely to the Official Assignee. As in the case of other after-acquired property, the insolvent, if the trustee does not intervene, may sue for and recover them (h). On the other hand the earnings of a bone-setter, an actor, or a singer, are “personal earnings,” for they depend entirely upon the personal exertion of the insolvent and nothing else (i).

539. Bankrupt cannot be compelled to work.—It may be observed in this connection that a bankrupt cannot be compelled to work

(x) *Shoolbred v. Roberts* (1899) 2 Q. B. 560, 563; *Mercer v. Vans Colina* (1900) 1 Q. B. 130, n.

(y) *Affleck v. Hammond* (1912) 3 K. B. 162.

(z) *Jamasji v. Sorabji* (1908) 10 Bom. L. R. 570.

(a) *Re Rogers* (1894) 1 Q. B. 425, 430; *Crofton v. Poole* (1830) 1 B. & Ad. 568, 100 E. R. 893.

(b) *Re Rogers, supra*.

(c) *Elliott v. Clayton* (1851) 16 Q. B.

581, 117 E. R. 1002.

(d) *Re Dowling* (1877) 4 Ch. D. 689.

(e) *Emden v. Carte* (1881) 17 Ch. D. 768.

(f) *Crofton v. Poole* (1830) 1 B. & Ad. 568, 100 E. R. 898.

(g) *Re Collins* (1925) Ch. 556.

(h) *Jameson v. Brick & Stone Co., Ltd.* (1878) 4 Q. B. D. 208; *Emden v. Carte* (1881) 17 Ch. D. 169, and on appeal, 768. See also *Bailey v. Thurston & Co., Ltd.* (1903) 1 K. B. 137.

(i) *Re Rogers*, at p. 430, *supra*.

and earn money for the benefit of his creditors (j). As observed by Lord Mansfield, "the assignees [now trustees in bankruptcy] cannot let out the bankrupt; they cannot contract for his labour" (k); the bankrupt, in other words, cannot be made "the slave of the trustee" (l).

(4) *Salary, pay and other income of insolvent.*

540. (4) Salary of public officers and others under Presidency-towns Insolvency Act, sec. 60.—In cases governed by the Presidency-towns Insolvency Act, where an insolvent is an officer of the Army or Navy or of His Majesty's Royal Indian Marine Service, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the Official Assignee is to receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct (m). The Official Assignee cannot, without an order of the Court, recover any portion of the pay or salary. Until the order is made, the whole of the pay or salary belongs to the insolvent (n).

Salary or income from any other source.—In cases governed by the Presidency-towns Insolvency Act, where an insolvent is in receipt of a "salary or income" other than the salary or pay mentioned in the preceding paragraph, the Court may, at any time after adjudication and from time to time, make such order as it thinks just for the payment to the Official Assignee, for distribution amongst the creditors, of so much of such salary or income as may be liable to attachment in execution of a decree, or of any portion thereof (o). The Official Assignee cannot, without an order of the Court, recover any portion of the salary or income. Until the order is made, the whole of the salary or income belongs to the insolvent, and he is entitled to vary agreements entered into by him with his employer in respect of his personal services (p). In determining whether the whole of the attachable salary or income should pass to the Official Assignee or only a portion thereof, the Court will have regard to what is reasonably necessary for the maintenance of the insolvent, his wife and family (q). On the insolvent's discharge, an order made in respect of his salary or income will cease unless the continuance of payments is expressly ordered (r).

Nice questions have arisen as to the meaning of "salary" and "income." A salary is none the less so because terminable at a week's notice. Thus a commercial traveller engaged at an annual salary of Rs. 1,500, payable weekly, is in receipt of a "salary," though his engagement is terminable at a week's notice (s). A purely voluntary allowance which may be withdrawn at any time is not "income." The income must be one to which the insolvent is

(j) *Re Jones* (1891) 2 Q. B. 231, 232; *Bailey v. Thurston & Co., Ltd.* (1903) 1 K. B. 137, 145.

(k) *Chippendall v. Tomlinson* (1785) 4 Doug. 318, 99 E. R. 318.

(l) *Cohen v. Mitchell* (1890) 25 Q. B. D. 262, 268.

(m) Presidency-towns Insolvency Act, s. 60 (1). Cf., B. A., 1914, s. 51.

(n) See in the matter of *C. M. J. Dona-*

ghue (1895) 19 Bom. 232, a case under s. 27 of the I. I. A., 1848.

(o) Presidency-towns Insolvency Act, s. 60 (2). Code of Civil Procedure, 1908, s. 60.

(p) *Re Shine* (1892) 1 Q. B. 522.

(q) See *Ex parte Official Receiver* (1896) 1 Q. B. 417; *Re Rogers* (1891) 1 Q. B. 425.

(r) *Re Gold* (1891) 8 Mor. 45.

(s) *Re Brindley* (1887) 4 Mor. 104.

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entitled in law (t). Again "income" means income in the nature of a salary; it has reference to a particular period such as a year or some part of a year. The prospective earnings of a professional man (u) are not "income" within the meaning of the section; nor are the wages earned by a workman employed in a colliery (v). Commission earned by an insolvent in respect of policies of insurance effected through him is an asset and not "income" (w). But the weekly salary of an actor playing under an agreement is "salary or income" (x). The question whether the earnings of an insolvent in a particular case constitute his "salary or income" is important, for the maximum amount which can pass to the Official Assignee in the case of "salary or income" is the amount attachable in execution of a decree under sec. 60 of the Code of Civil Procedure, 1908.

540A. Salary of public officers and others under Provincial Insolvency Act.—There is no specific provision in the Provincial Insolvency Act as to the salary or pay of public officers or others as in the Presidency-towns Insolvency Act. Such salary or pay will therefore vest in the Receiver to the extent to which it can be attached in execution of a decree (y). But the whole of what is liable to attachment is not divisible and amongst the creditors, for provision will have to be made out of it for the maintenance of the insolvent and his family as provided by sec. 66 (2) of that Act (z).

(5) *Subsequent trade creditors.*

541. (5) Subsequent trade creditors and estoppel of Official Assignee.—Where the insolvent with the knowledge of the Official Assignee and with his consent, carries on a trade after adjudication and before discharge, and incurs fresh debts in the course of the trade, the persons to whom the debts are due (usually called subsequent creditors) are entitled to be paid out of the earnings of that trade in priority to any claim of the Official Assignee on behalf of the original creditors (a). This proceeds upon the general equitable principle that if a man having a charge on property stands by and allows another to advance money on it on the supposition that it is unencumbered, he ought to be postponed to the person so advancing the money. The case is really one of estoppel, the Official Assignee being estopped on equitable grounds from setting up his title adversely to subsequent creditors (b).

3. Powers.

542. General power of appointment [P.-t. I. A., s. 52 (2) (b)].—The insolvent may have a general power of appointment over property

- (t) *Ex parte Wicks* (1881) 17 Ch. D. 70; *Ex parte Webber* (1886) 18 Q. B. D. 111.
- (u) *Ex parte Benwell* (1884) 14 Q. B. D. 301 [bons setter].
- (v) *Re Jones* (1891) 2 Q. B. 231.
- (w) *Jamasji v. Sorabji* (1908) 10 Bom. L. R. 579.
- (x) *Re Shina* (1892) 1 Q. B. 522.
- (y) *Prov. I. A., s. 23 (5)*.
- (z) *Radha Mohan v. M.C. White* (1923) 45 All. 384, 73 I. C. 413, ('23) A. A. 466, dissenting in this respect

- from dicta in *Debi Prasad v. J. A. H. Lewis* (1918) 40 All. 213, 43 I. C. 984. See also *Ram Chandra Neogi v. Shyama Charan Bose* (1913) 18 C. W. N. 1052, 21 I. C. 952.
- (a) *Troughton v. Gilley* (1766) Amb. 630, 27 E. R. 408; *Engelbach v. Nixon* (1875) L. R. 10 C. P. 645. See also *Kerakoose v. Brooks* (1860) 8 M. I. A. 339.
- (b) *Troughton v. Gilley* (1766) Amb. 630, 27 E. R. 408.

which may be exercised by him for his own benefit and for his sole benefit. This power he may have at the commencement of his insolvency or he may acquire it after insolvency and before discharge. The power may be one exercisable by deed, or by deed or will, or by will only. If the power is exercisable by deed, it vests in the Official Assignee, and he may exercise it for the benefit of the creditors. But it can be exercised only so long as the insolvent is alive; it cannot be exercised after his death for the insolvent himself could not have done so (c). The same rule applies where the power is exercisable by deed or will. If, however, the power is exercisable by will only, it does not pass to the Official Assignee (d).

There is no corresponding provision in the Provincial Insolvency Act. Therefore no such power passes to the Receiver in cases governed by that Act, not even as "property." "Property" as defined in that Act (as also in the Presidency-towns Insolvency Act) includes "any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit" (e). But a general power of appointment over property is not "property" within the meaning of that word as used in law (f), or within the meaning of the above definition. "The power of a person to appoint an estate to himself is no more his 'property' than the power to write a book or to sing a song. The exercise of any one of these three powers may result in property, but in no sense which the law recognises are they 'property'" (g). Until he appoints to himself, there is no property which he can dispose of for his benefit (h).

542A. Power to revoke trusts [P.-t. I. A., s. 52 (2) (b)].—It would seem that a power reserved by a settlor in a deed of settlement to revoke the trusts of the deed so as to re-vest the property in himself will pass on his insolvency to the Official Assignee and may be exercised by him.

542B. Power of attorney.—An act of insolvency, in cases governed by the Presidency-towns Insolvency Act, is a revocation as against the Official Assignee of a power of attorney given by the insolvent (i), unless the power is irrevocable (j). A *bona fide* purchaser, however, taking a conveyance of the insolvent's property from the donee of the power before adjudication and without notice of the presentation of an insolvency petition will be protected by sec. 57 of the Act and he will be entitled to retain the property as against the Official Assignee (k). The same rule applies to cases governed by the Provincial Insolvency Act except that under that Act the presentation of an insolvency petition on which the order of adjudication is made operates as a revocation of the authority and not the commission of an act of insolvency (l).

(c) *Nichols v. Nixey* (1885) 29 Ch. D. 1005.

(d) *Re Benzon* (1914) 2 Ch. 68; *Re Guedalla* (1905) 2 Ch. 331.

(e) This definition appears to have been borrowed from sec. 266 of the Civil Procedure Code, 1882, now sec. 60 of the Civil Procedure Code, 1908.

(f) *Re Gilchrist* (1886) 17 Q. B. D. 521, 531; *Re Mathieson* (1927)

1 Ch. 283.

(g) *Re Gilchrist* (1886) 17 Q. B. D. 521, 531.

(h) As to the definition of "property" in the English Acts, see B. A. 1883, s. 186, and B.A., 1914, s. 167.

(i) P.-t. I. A., s. 51.

(j) Indian Contract Act, s. 202.

(k) See *Ex parte Snowball* (1872) L. R. 7 Ch. App. 534.

(l) Prov. I. A., ss. 28 (7), 66.

LECTURE IX.

REPUTED OWNERSHIP.

A.—Under Presidency-towns Insolvency Act.

Para. 543 **543. Meaning of "reputed ownership" [P.-t. I. A., s. 52 (2) (c)].**—We now proceed to consider what is known as the doctrine of reputed ownership. The doctrine of reputed ownership applies only in the case of traders. The enactment as to reputed ownership has for its object the protection of the general creditors of a trader against that false credit which might be acquired by his being suffered to have the possession and power of disposition of property as his own, which does not really belong to him (a). The provision as to reputed ownership is contained in clause (c) of sec. 52 (2) of the Presidency-towns Insolvency Act. By that clause it is provided that goods which are at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, are divisible among his creditors. The term "goods" in this context does not include things in action other than debts due or growing due to the insolvent in the course of his trade or business. This provision is known as the reputed ownership clause and also as the order and disposition clause. The object of the provision is to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who deal with them (b).

It is not only goods of which the insolvent is the true owner at the commencement of the insolvency which vest in the Official Assignee, but also goods which belong to other people of which the insolvent is the apparent or reputed owner. Thus if a person buys goods from a trader and pays for them, but allows the goods to remain in the possession of the seller, and the seller becomes insolvent, the goods will as a general rule pass to the Official Assignee and will be divisible amongst the creditors of the insolvent. The reason is that by allowing the goods to remain in the apparent ownership of the insolvent, the buyer places the insolvent in a position to obtain false credit by means of them. In such a case the buyer is the true owner of the goods, and the insolvent is the apparent or reputed owner thereof. The goods are said to be in the reputed ownership of the insolvent, or in his possession, order or disposition. Similarly if goods are sent to a shop for sale, and the shopkeeper becomes insolvent, the goods will as a general rule pass to the Official Assignee. The reason is that "if property be sent to a shop where goods are sold as the property of the shopkeeper, that property is placed in such a situation as, in the eyes of the world, would

(a) *Henley*, 269.(b) *Ryall v. Rowles* (1750) 1 Ves. Sen. |

348, 372, 27 E. R. 1074.

fairly lead to the inference that it belongs to the possessor" (c). The property being held out to the world as that of the shopkeeper it will be treated as his on his insolvency and be divisible among his creditors. By far the largest number of cases of reputed ownership arise in connection with mortgages of goods. Thus if a trader mortgages his goods, but continues in possession thereof with the consent of the mortgagee, and before the due date becomes insolvent, the goods will vest in the Official Assignee and the mortgagee will lose his security (d). Here the mortgagee is the true owner of the goods and the mortgagor is the apparent or reputed owner thereof. A person may be the reputed owner though he may have some beneficial interest in the goods, e.g., a mortgagor or a lessor. The effect of the reputed ownership clause is to transfer to the Official Assignee property which does not belong to the insolvent. It is to take one man's property to pay another man's debts. This is one of those cases in which the Official Assignee has a higher title than the insolvent himself would have had (see para. 58 above). The insolvent himself could not have claimed the goods at any time as his own, but the Official Assignee is entitled to claim them as the goods of the insolvent for the benefit of the general body of his creditors (e). Before proceeding further it may be as well to point out that under the Provincial Insolvency Act the doctrine of reputed ownership does not apply to goods which have been mortgaged or hypothecated by the insolvent, and this is the substantial point of difference between the two Acts. Where goods are mortgaged or hypothecated, the Receiver takes the goods subject to the mortgage or hypothecation (para. 579).

544. History of reputed ownership clause.—Reputed ownership has been part of the bankruptcy law of England since 21 Jac. 1, c. 19, s. 11. It has been couched in various terms in the successive bankruptcy statutes (f), but the same principle has run through them all. The scope and object of the reputed ownership clause in the Statute of James I was thus explained by Lord Redesdale in *Joy v. Campbell* (g): "That clause refers to chattels in the possession of the bankrupt in his order and (h) disposition, with the consent of the true owner; that means where the possession, order and disposition is in a person who is not the true owner, to whom the goods did not properly belong, and who ought not to have them, but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of property to which he was not entitled ;

- (c) *Hamilton v. Bell* (1854) 10 Ex. 545, 551, 156 E. R. 554, 558.
(d) *In re Ginger* (1897) 2 Q. B. 461.
(e) *Taylor v. Eckersley* (1877) 5 Ch. D. 740, 745.
(f) See 5 Geo. 4, c. 16, s. 72; B.A., 1849, s. 125; B.A., 1869, s. 15;

- B. A., 1883, s. 44; B. A., 1914, s. 38.
(g) (1804) 1 Sch. & Lef. 328, 336.
(h) The word "and" occurred in the Statute of James. In subsequent statutes the word "or" was substituted for "and".

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544, 545**

but in the construction of the Act the nature of the possession has already been considered and the words have been construed to mean possession of the goods of another with the consent of the true owner." "This does not mean," as observed by the Court of Appeal in *In re Watson* (i), "that he (the true owner) must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe not might or might not) arise."

Lord Redesdale's exposition of the doctrine of reputed ownership has been approved and acted on in subsequent cases. In *Ex parte Wingfield* (j), James, L.J., in dealing with the corresponding clause of the Bankruptcy Act, 1869 [sec. 15 (5)], said: "The section must be read as the similar provision in the bankruptcy statutes from the time of 21 James I has always been read with some attention to common sense. It has always been construed as meaning this, that if goods are in a man's possession, order or disposition, under such circumstances as to enable him by means of them to obtain false credit then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit." If the true owner loses the goods by virtue of the reputed ownership clause, his only remedy is to prove in insolvency for the value of the goods like any other creditor of the insolvent (k). It is, of course, a strong measure to take one man's property to pay another man's debts. Hence the conditions laid down in the section must be strictly complied with.

545. When reputed ownership clause applies.—The following conditions must be complied with before the Official Assignee can have any claim under the reputed ownership clause to property or to any interest in property which does not belong to the insolvent:—

- A. The property must be goods [para. 546]. "Goods" include trade debts [para. 548].
- B. The goods must be in the possession, order or disposition [paras. 549-551] of the insolvent in his trade or business [para. 547], at the commencement of the insolvency [paras. 552, 573].
- C. They must be in the possession, order or disposition of the insolvent under such circumstances that he is the reputed owner thereof [paras. 553-557].
- D. The true owner must consent—
 - (a) not only to the possession of the goods by the insolvent;
 - (b) but also to the possession thereof—
 - (i) in the insolvent's trade or business (ii) under such circumstances that the insolvent is the reputed owner of the goods [paras. 558-572.]

(i) (1904) 2 K. B. 753, 757.

(j) (1879) 10 Ch. D. 591, 594.

(k) P.-t. I. A., second proviso to s. 52

(2) (c); *In re Button* (1907) 2 K. B. 180.

It follows from what is stated above that the reputed ownership clause does not apply if the true owner determines the possession or revokes his consent before the commencement of the insolvency, or even after its commencement, provided he does so before the date of the order of adjudication and without notice of the presentation of any insolvency petition by or against the debtor. This subject is considered under head "E" on p. 402 below [paras. 573-579].

The four conditions mentioned above may now be considered.

A.—The property must be goods.

546. Goods.—The reputed ownership clause applies only to goods (*l*). It does not apply to immovable property (*m*) or to any interest in such property (*n*). The reason is that immovable property is held not by possession but by title (*o*). It is otherwise in the case of personal property, for the possession of personal property is generally the title on which the world relies (*p*). A man does not get credit merely from the possession of land but from the interest which he has in it, while he may obtain credit from the bare possession of goods (*q*). Nor does the doctrine apply to fixtures, that is chattels annexed to the freehold for the improvement thereof (*r*). The fact that as between landlord and tenant such fixtures would be removable by the tenant makes no difference (*s*). These therefore do not pass to the Official Assignee on the insolvency of the person in possession thereof. On the other hand, articles slightly annexed by a shopkeeper to the premises of which he is the tenant for the more efficient use thereof, and not for the improvement of the freehold, retain their character of chattels and vest in the Official Assignee on his insolvency (*t*). Growing crops, it would seem,

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| <p>(<i>l</i>) The word "goods" is defined in the B. A., 1883, s. 168, and the B. A., 1914, s. 167, as including all chattels personal. There is no definition of "goods" in the Indian Insolvency Acts. In s. 76 of the Indian Contract Act, 1872, the term "goods" is defined as including every kind of movable property.</p> <p>(<i>m</i>) For the definition of "immovable property", see the General Clauses Act, 1897, s. 3 (25). For the definition of "movable property", see s. 3 (34) of that Act.</p> <p>(<i>n</i>) <i>Ryall v. Rowles</i> (1750) 1 Ves. Sen. 348, 27 E. R. 1074.</p> <p>(<i>o</i>) <i>Hiern v. Mill</i> (1806) 13 Ves. 114, 122, 33 E. R. 237, 240.</p> <p>(<i>p</i>) <i>Gordon v. The East India Company</i> (1797) 7 T. R. 228, 234, 101 E. R. 946, 950.</p> <p>(<i>q</i>) <i>Roe v. Galliers</i> (1787) 2 T. R. 133, 141, 100 E. R. 72, 76.</p> | <p>(<i>r</i>) <i>Horn v. Baker</i> (1808) 9 East. 215, 103 E. R. 555; <i>Macleod v. Kikabhoy</i> (1901) 25 Bom. 659 [fixtures annexed to a flour mill]. See on this subject 2 Smith's L. C., 11th ed., p. 232.</p> <p>(<i>s</i>) <i>Macleod v. Kikabhoy</i> (1901) 25 Bom. 659.</p> <p>(<i>t</i>) <i>Horwich v. Symond</i> (1914) 110 L. T. 1016; <i>Macleod v. Kikabhoy</i> (1901) 25 Bom. 659. The reputed ownership clause is to be read in conjunction with and as qualified by s. 62 of the Presidency-towns Insolvency Act. Therefore, if land and personal chattels are leased together at one entire rent, and the trustee in bankruptcy disclaims the lease, he cannot claim the chattels under the doctrine of reputed ownership; <i>Ex parte Allen</i> (1882) 20 Ch. D. 341.</p> |
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Paras. 546, 547 are not goods within the meaning of this section (u). Nor is an equity of redemption (v). But "goods", it seems, would include money.

B.—The goods must be in the possession of the insolvent in his trade or business.

547. "In his trade or business."—The doctrine of reputed ownership as stated above, applies only to goods. But it does not extend to all kinds of goods. It extends only to such goods as are in the possession, order or disposition of the insolvent "in his trade or business." The words "in his trade or business" did not occur in the Indian Insolvency Act, 1848 (w); nor did they occur in any of the English Bankruptcy statutes before the Bankruptcy Act, 1883. The result was that all goods, whether they were in the possession of the insolvent in his trade or not, passed to the Official Assignee under the reputed ownership clause. Under the present Act only such goods as are in the possession of the insolvent in his trade or business pass to the Official Assignee. Goods not used for purposes of the insolvent's trade or business do not pass to the Official Assignee. Thus household furniture at the private residence of a trader which under the old law passed to the Official Assignee under the reputed ownership clause will no longer pass to him. So if a silk mercer were to hire a yacht for his amusement, the yacht cannot be said to be in his possession in his trade as a silk mercer, and it will not pass on his insolvency to the Official Assignee (x). In *Ex parte Lovering* (y), it was held by the Court of Appeal that pictures in the warehouse and counting house of a firm of woollen manufacturers cannot be said to be in the possession of the firm in the firm's trade or business. In that case Baggalay, L.J., said: "The question on which I have felt some little doubt is, whether inasmuch as the pictures were kept in the warehouse or in the counting house of the firm, they must not be taken to have been in the reputed ownership of the firm. I think there would have been a great deal in that argument if, instead of pictures, the articles in question had been ready-made coats or something else connected in some way with the business of the firm. It might well have been thought by the creditors that the firm were dealing in ready-made coats as well as in woollen goods not made up. But pictures had no connection whatever with the business of the firm and I can see nothing to show that they were ever treated as the property of the firm. There was nothing to give colour to the idea that the pictures were the property of the firm." In the same case Lindley, L.J., observed: "Whatever might have been the case if the firm had been picture dealers, it seems to me idle under the circumstances to say that these pictures were in the order and disposition of the firm."

(u) See *Cooper v. Woolfitt* (1857) 20 L. J. Ex. 310.

(v) *Official Assignee, Madras v. Valliappa Chetti* (1922) 45 Mad. 238, 243-244, 69 I. C. 968, ('22) A. M. 144.

(w) See I. I. A., 1848, s. 23.

(x) *In re Jenkinson* (1885) 15 Q. B. D. 441, 444.

(y) (1883) 24 Ch. D. 31.

In *Colonial Bank v. Whinney* (z), the question arose as to the meaning of the words "in his trade or business" as used in sec. 44 of the Bankruptcy Act, 1883. Cotton, L.J., observed that the true construction was that the goods must be in the bankrupt's possession "for the purposes of, or purposes connected with, his trade or business." In the same case Lindley, L.J., construed the words as meaning "not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes." The actual decision of the Court of Appeal in *Colonial Bank v. Whinney* was reversed by the House of Lords (a), but on grounds which do not affect the interpretation put upon the words "in his trade or business" by the Lords Justices. Following that interpretation it was held in *Sharman v. Mason* (b) that stands used in the business of a mantle-maker for the purpose of showing off to advantage the mantles in the shop were goods in his possession, order or disposition, in his trade or business, it being proved that the stands were in his possession by the consent and permission of the true owner, and that on the insolvency of the mantle-maker they passed to the trustee in bankruptcy. It was contended in that case that the stands could not be said to be within the possession, order or disposition of the bankrupt as the bankrupt could not have sold them or otherwise obtained credit upon them in the course of his trade or business. But this contention was overruled, and it was held that all goods which might be held to have sufficient importance to enter into the value of a trade or business in the mind of an intending lender would fall within the reputed ownership clause. In *Sharman v. Mason* the true owner had lent his goods for use to a trader.

In *Re Watson & Co.* (c), the bankrupts carried on business as bankers and East India Agents, and in connection with that business they fitted up a part of the premises with show cases and invited a number of wholesale houses to send them sample goods for exhibition in the show cases with a view to the customers of the bankrupts ordering goods from the samples. Pursuant to their invitation Messrs. Aitkin Brothers, a wholesale firm of silversmiths and electro-platers, sent electro-plated goods to the bankrupts to be exhibited in their show cases as samples. The goods were to remain in the show cases at the risk of Messrs. Aitkin Brothers. The usual practice of the bankrupts was to introduce their customer to Messrs. Aitkin Brothers who supplied him from their warehouse with goods corresponding to the samples, but in cases of urgency the bankrupts sold the samples themselves. The question arose whether on the bankruptcy of the bankrupts the goods were in their reputed ownership so as to pass to the trustee in bankruptcy. It was held that they were not, the ground of the decision being that Messrs.

(z) (1885) 30 Ch. D. 261, at p. 274.
(a) (1886) 11 App. Cas. 426.

(b) (1889) 2 Q. B. 679.
(c) (1904) 2 K. B. 753.

Para. 547 Aitkin Brothers never consented to such a possession of the goods as would carry reputed ownership with it. It was contended on behalf of the trustee in bankruptcy that in fact the bankrupts dealt with the goods in their trade or business in such a fashion that customers could not but presume that the goods were dealt with by them at their unfettered order and disposition. It was held that the case was not one as to which it could be said that the true owners of the goods by their unconscientious conduct or laches had acquiesced in the bankrupts so dealing with the goods as to hold themselves out as the owners of the goods or induce customers to presume such ownership.

It is not enough that goods are sometimes employed in business. That must be their primary use. Thus where a pleasure car adapted to private use is sold under a hire-purchase agreement for private use but is occasionally used by the buyer without the knowledge of the seller for business purposes, the car cannot be said to be in the reputed ownership of the buyer "in his trade or business." The car was not acquired for the purposes of business nor was it used primarily for business (d). On the other hand a car (e), or a motor lorry (e1), acquired and used for the purposes of business would be "goods" in the possession of the insolvent "in his trade or business".

"Business".—Nice questions sometimes arise as to the meaning of the word "business". There is no definition of the words "trade or business" (f) either in the English or the Indian Acts. The term "business" has a more extensive signification than "trade". Thus farming is a "business" though not a "trade" (g). A lodging-house keeper has been held to carry on a "business," though he does not provide the lodgers with board (h). A person who being the owner of various hotels successively transfers them to companies in consideration of shares and becomes the managing director thereof, carries on "business" within the meaning of this section (i). The "business" must be carried on with a view to profit as a means of livelihood; it is not sufficient that a profit is made if the primary object was pleasure. Thus a person who occupies a residential property and engages in farming and market-gardening for his pleasure, and makes a profit by a sale of the surplus produce after supplying his household, is not carrying on a "trade or business" within the meaning of this section (j).

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| <p>(d) <i>Lamb v. Wright</i> (1924) 1 K. B. 857, 865-866.</p> <p>(e) <i>In the matter of N. W. Nasse</i> (1924) 2 Rang. 154, 83 I. C. 546, ('24) A. R. 297.</p> <p>(e1) <i>Gordhandas v. Official Assignee</i> (1929) 117 I. C. 158, ('29) A. S. 167.</p> <p>(f) The words used in the Bankruptcy Act, 1869, s. 15, were "in the possession, order or disposition of the bankrupt, being a trader".</p> | <p>The Act also contained a definition of "trader".</p> <p>(g) <i>Harris v. Amery</i> (1865) N. R. 1 C. P. 148, at p. 154; <i>Wheatley v. Smithers</i> (1906) 2 K. B. 321, 322.</p> <p>(h) <i>Re Harrison</i> (1888) 67 L. T. 600.</p> <p>(i) <i>Re Clark</i> (1914) 3 K. B. 1095, a case under s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913.</p> <p>(j) <i>Re Wallis</i> (1885) 14 Q. B. D. 950.</p> |
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548. Things in action and trade debts.—The word “goods” does not include things in action other than debts due or growing due to the insolvent in the course of his trade or business. A thing in action is defined as “a thing of which the man has not the possession or actual enjoyment but has a right to demand by action or other proceeding” (l). Trade debts are the only things in action which pass under the reputed ownership clause. Where a trade debt due to an insolvent has not been assigned by him prior to his insolvency, he remains the sole owner thereof, and it will pass on his insolvency to the Official Assignee, not under the reputed ownership clause, but as property belonging to the insolvent. It is only when the insolvent has assigned a trade debt to a third person, e.g., by way of security for a debt, that the question of reputed ownership arises. In such a case if the assignee gives notice of the assignment to the insolvent’s debtor, the assignee is the sole owner of that debt, and he is entitled to payment if the assignor becomes insolvent. If no notice is given, the assignee is the true owner and the insolvent is the reputed owner of the debt, and the debt will pass to the Official Assignee. Para. 548

Prior to the Bankruptcy Act, 1869, there was no separate provision as to things in action. It was, however, held that the words “goods and chattels” included things in action and that they passed to the trustee in bankruptcy as much as goods and chattels (m). Thus shares in companies, stock in public funds, policies of insurance, annuities, etc., were all held to come within the expression “goods and chattels” and to be subject to the doctrine of reputed ownership. The Act of 1869 first confined the operation of the doctrine to a particular class of things in action, namely, “debts due or growing due to the insolvent *in the course of his trade or business*.” Since that enactment the only things in action subject to that doctrine are *trade debts*, ordinarily termed a trader’s book debts. All other things in action such as shares (n), company debentures (o), policies of life assurance (p), the share of a partner in an ordinary partnership (q), stock in public funds and annuities, are excepted from the operation of the doctrine of reputed ownership. In *Colonial Bank v. Whinney* (r), Lord Fitzgerald said: “It seems to me, on a careful examination of the section and proviso, that the intention of the legislature was to narrow very much the ‘order and disposition’ clause so as to confine it to such goods as might be in the order and disposition of the bankrupt ‘in his trade or business’ and, save in

(l) Wharton’s Law Lexicon, 11th ed., p. 169. As to definition of actionable claim, see Transfer of Property Act, 1882, s. 3.
(m) *Ryall v. Rowles* (1749) 1 Ves. Sen. 348, 371, 27 E. R. 1074, 1088.
(n) *Colonial Bank v. Whinney* (1886) 11 App. Cas. 426; *Re Jenkinson*

(1885) 15 Q. B. D. 441; *Lalit v. Haridas* (1916) 24 C. L. J. 335, 37 I. C. 707.
(o) *Re Pryce* (1877) 4 Ch. D. 685.
(p) *Ex parte Ibbetson* (1878) 8 Ch. D. 519.
(q) *Re Bainbridge* (1878) 8 Ch. D. 218.
(r) (1886) 11 App. Cas. 426, 446.

Para. 548 the case of 'debts due to the bankrupt in the course of his trade or business', to exclude all those incorporeal rights which are not visible or tangible or capable of manual delivery or of actual enjoyment in possession, in its ordinary sense, and which, if denied, can be enforced only by action or suit."

The expression "debts due" mean debts presently payable. The expression "debts growing due" mean debts not presently payable. These two expressions taken together comprise all book debts of a trader whether the actual time for payment has arrived or not, but they do not include contingent claims. Thus where goods were pledged with bankers up to seventy per cent. of their value, it was held that the remaining margin of 30 per cent. for which the bankers had given "marginal-notes" was not a "debt due" within the meaning of the section (s). Instalments under a hire and purchase agreement accruing due at the commencement of the insolvency of the hirer are debts "growing due" (t). A trade debt remains a "debt" notwithstanding that judgment is obtained on it (u).

The reputed ownership clause does not include all debts which may happen to be due to the insolvent *during the period of his trading*. It applies only to debts due to the insolvent *in the course of his trade or business*. The debt therefore must be one connected with his trade or business (v). A debt not connected with his trade or business is outside the scope of this section. The reason why this clause is confined to trade debts and excludes other debts is that trade debts form a most important part of a trader's assets, and a trader is more likely to obtain credit in his business on the faith of trade debts than on the faith of debts other than trade debts (w). Thus a trader may invest his money in debentures or shares of a joint-stock company. Such a debenture or share is a debt due to him by the company, but it is no more than an investment. It is not a debt due or growing due to him in the course of his trade or business. If he, therefore, assigns the debentures or share certificates to a creditor, the debentures or certificates will not pass to the Official Assignee. If it were otherwise, every investment made by a man engaged in a trade would be a debt due to him in the course of his trade. Such, however, was never the intention of the legislature (x). What then is a debt due to an insolvent "in the course of his trade or business"? The price of goods due to a trader who deals in such goods, hire due to a trader for furniture let out by him, money due to a stock-broker from his constituent, freight due to the owners of a ship under a charter-party, are instances of debts due to a person in the course of his trade or business. These, if

(s) *Ex parte Kemp* (1874) L.R. 9 Ch. App. 383, a case under the Bankruptcy Act, 1869, s. 15.
 (t) *Ex parte Rowlings* (1888) 60 L. T. 150.
 (u) *Re Wethered* (1926) 1 Ch. 167.
 (v) *Re Pryce* (1877) 4 Ch. D. 685;

Re Jenkinson (1885) 15 Q.B.D. 441.
 (w) *Ex parte Kemp* (1874) L. R. 9 Ch. 383, 389; *Re Wethered* (1926) 1 Ch. 167, at pp. 174-175.
 (x) (1877) 4 Ch. D. 685, 688, *supra*; (1885) 15 Q. B. D. 441, 445, *supra*.

transferred by him, pass on his insolvency to the Official Assignee, if no notice of transfer is given by the "transferee" to the person who owes the debt to the insolvent. The transferee of the debt is the true owner thereof, and if he omits to give notice of the transfer to the insolvent's debtor, it is regarded as conclusive evidence of his consent to the debt remaining in the reputed ownership of the insolvent. Thus where a person, having contracted to supply meat to a lunatic asylum, to be paid for within a certain time after delivery of the meat, being unable to carry out the contract, assigned the contract to a butcher who delivered his own meat, but in the name of the contractor, the governing body of the asylum having no notice of the assignment, and the contractor afterwards became bankrupt, it was held that the butcher having failed to give notice of the assignment to the governing body of the asylum the price of meat due from the asylum to the contractor was a debt in the reputed ownership of the bankrupt, and that the trustee in bankruptcy, and not the butcher, was entitled to it. Had the butcher given notice of the assignment of the contract to the governing body of the asylum, it would have prevented the debt from being within the operation of the reputed ownership clause (z).

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549. Goods must be in the possession, order or disposition of the insolvent.—Goods of which the insolvent is not the real owner—and these are the goods we are now dealing with—may not be in the actual possession of the insolvent at the commencement of the insolvency. They may be in the hands of his servant or in the hands of a warehouse-keeper or a carrier on his behalf; or they may be in the hands of a pawnee from him; or they may be in the custody of law as where they are seized by the sheriff under an execution issued against the insolvent, or are seized under a distress for rent, or are taken possession of by a receiver appointed by the Court. In all these cases the question arises whether the goods can be claimed by the Official Assignee. It is clear that unless they be deemed to be in the possession, order or disposition of the insolvent, they cannot pass to the Official Assignee.

It is not necessary for the application of the doctrine of reputed ownership that the goods should be on the insolvent's premises or in his actual possession; constructive possession is sufficient. Thus goods in the possession of a servant of the insolvent (a) or of a warehouse-keeper (b) or carrier (c) on his behalf, or of one who has hired them from the insolvent (d), are in the possession of the insolvent. In all these cases the goods are held by the person in whose hands they are subject to the order and disposition of the insolvent; they cannot be delivered to any other order than his.

(z) *Cooke v. Hemming* (1868) L. R. 3 C. P. 334; *Worth v. Gurney* (1861) 1 J. & H. 509, 70 E. R. 847.
(a) *Jackson v. Irwin* (1809) 2 Camp. 48, 170 E. R. 1077; *Ex parte Bolland* (1871) 24 L. T. 335.

(b) *Knowles v. Horsfall* (1821) 5 B. & A. 134, 106 E. R. 1142.
(c) *Hervey v. Liddiard* (1815) 1 Stark. 123, 171 E. R. 421.
(d) *Hornsby v. Miller* (1858) 28 L. J. Q. B. 99

Para. 549 *Pledge of goods held by reputed owner.*—What is the position if the goods held by the insolvent as reputed owner have been pledged by him and they are in the possession of the pawnee at the commencement of the insolvency? Upon this point there is a conflict of authority. In two English cases it was held that the possession of the pawnee is not the possession of the bankrupt. The ground of the decision was that the bankrupt could not have obtained possession of the goods from the pawnee without repaying to him the money that he had advanced (e). In *Ex parte Roy* (f), however, it was held that goods in the possession of a pawnee are in the order and disposition of the bankrupt, and consequently pass to the trustee. The reason given was that the pledge by the bankrupt was wrongful as against the true owner, and it did not therefore entitle the pawnee to retain the goods. *Ex parte Roy* is not likely to be followed in India (g).

Illustrations.

(a) A buys cotton from B, and pays the price to B. The goods are left with B who pledges them with C. C sells the goods as pawnee and there remains a surplus in his hands after he has paid himself the amount of the loan made by him to B. B afterwards becomes bankrupt, and the surplus is claimed both by A, the purchaser of the goods, and the trustee in bankruptcy of B, the vendor. Held, that the goods were not in the possession, order or disposition of the bankrupt, and that A, and not the trustee, was entitled to the surplus: *Greening v. Clark* (1825) 4 B. & C. 316, 107 E.R. 1077.

(b) A father makes a gift of a plate to his son. The plate is then put into a chest and the key is given to the son. The son leaves the chest with the father who sends it to his bankers for safe custody. Whilst the chest is in charge of the bankers, the father consents to the bankers having a lien on it for the amount of his overdrawn account. The father afterwards becomes bankrupt, and the trustee in bankruptcy takes possession of the chest from the bankers. The son then claims the chest from the trustee. Held, that the chest was not in the possession, order or disposition of the father, and the son, and not the trustee, was entitled to it: *Webb v. Whinney* (1868) 18 L.T. 523.

Contra:—

(c) The owner of certain horses delivers them to a horse-dealer for sale. The dealer sells a pair to R, who buys them from him believing him to be the owner and pays the price to him. R finds the horses not according to warranty, and returns them. Thereafter the dealer sends to R another pair which is no better than the first. It is then arranged between the dealer and R that R should use the second pair of horses until the dealer supplies him with a better pair, and that until then R should have a lien upon the horses. The dealer afterwards becomes bankrupt, and the trustee in bankruptcy claims the horses from R, no claim having been made by the owner. Held, that the horses were in the bankrupt's order and disposition, and that R was not entitled to retain them and enforce the lien on them as against the trustee in bankruptcy: *Ex parte Roy* (1877) 7 Ch. D. 70.

(e) *Greening v. Clark* (1825) 4 B. & C. 316, 107 E. R. 1077; *Webb v. Whinney* (1868) 18 L. T. 523. These cases were cited with approval in *Official Assignee,*

Madras v. Valliappa Chetti (1922) 45 Mad. 238, 242, 69 I. C. 968 ('22) A. M. 144.

(f) (1875) 7 Ch. D. 70.
(g) See preceding foot-note.

Receiver of goods held by reputed owner.—As to goods in the custody of **Para. 549** law, it is well established that goods seized under a distress for rent (h), as well as goods taken possession of by a receiver appointed by the Court prior to insolvency (i), are not goods in the order and disposition of the insolvent, and do not pass to the Official Assignee.

Illustration.

A sues B for specific performance of an agreement whereby B undertook to give a bill of sale of his goods to A, and obtains the appointment of a receiver who takes possession of the goods. B is adjudicated an insolvent the next day. The goods having been taken possession of by the receiver ceased to be in the order and disposition of the insolvent; therefore, A's title will prevail over that of the Official Assignee: *Taylor v. Eckersley* (1877) 5 Ch. D. 740; *Nedungadi Bank Ltd. v. Official Assignee of Madras* ('29) A. M. 184.

Seizure by sheriff of goods held by reputed owner.—There is a divergence of opinion as to goods attached and seized by the sheriff under an execution against the insolvent. In two cases it was held that such goods were not in the order and disposition of the insolvent, and did not pass to the trustee (j). In a later case, however, it was held that they were in his order and disposition and passed to the trustee, the ground of the decision being that the sheriff's possession being wrongful as against the true owner, it could not be taken to have disturbed the possession of the bankrupt (k).

Illustration.

The proprietor of a newspaper mortgages the types and plant in his printing press to M. The types and plant are subsequently seized by the sheriff under an execution taken out against the owner of the newspaper by another creditor of his. M demands possession of the goods from the sheriff, but the sheriff refuses to deliver possession. The owner of the newspaper is afterwards adjudged bankrupt. In a contest between M and the trustee in bankruptcy it was held that seizure by the sheriff took the goods out of the possession of the bankrupt and that M's title prevailed over that of the trustee: *Ex parte Foss* (1868) 2 De G. & J. 230, 44 E.R. 977, following *Fletcher v. Manning* (1844) 12 M. & W. 571, 152 E. R. 1326. The contrary view was taken in *Ex parte Edey* (1875) L. R. 19 Eq. 264.

The principle of the decisions in *Fletcher v. Manning* and *Ex parte Ross* was followed in a Calcutta case (l), where it was held that the attachment of goods in execution of a decree against the mortgagor took the goods out of the possession of the mortgagor, and that the mortgagee was entitled to the benefit of that circumstance. Referring to the conflict of decisions in England, Wilson, J., said: "But the only ground suggested in [*Ex parte*

(h) *Sacker v. Chidley* (1865) 11 Jur. N. S. 654.

(i) *Taylor v. Eckersley* (1877) 5 Ch. D. 740; *Nedungadi Bank Ltd. v. Official Assignee, Madras* (1929) 52 Mad. 938, 118 I.C. 70, ('29) A. M. 184.

(j) *Fletcher v. Manning* (1844) 12 M. & W. 571, 152 E. R. 1326; *Ex parte Foss* (1868) 2 De. G. & J.

230, 44 E. R. 977, where the true owner had, before bankruptcy, demanded possession from the sheriff.

(k) *Ex parte Edey* (1875) L. R. 19 Eq. 264.

(l) *In the matter of R. Brown* (1886) 12 Cal. 629, 641.

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Edey] for saying that an actual seizure by the sheriff does not put an end to the reputed ownership is that the sheriff is in such a case a mere wrong-doer; his only authority being to seize the seizable goods of the judgment-debtor, and goods under mortgage, in which his interest is only equitable, not being liable to seizure under a *fiery facias*. In this country there is no distinction between legal and equitable titles for the purpose of execution, and the officer executing process by seizure is not a mere wrong-doer in a case like the present. The considerations therefore upon which it has been thought in England that seizure by the sheriff does not take the goods out of the order and disposition of the judgment-debtor, do not seem to apply in this country. Upon this point, however, it is not necessary to give any actual decision."

550. Sole possession essential.—In order to bring goods within the reputed ownership clause, they must be in the sole possession and sole reputed ownership of the bankrupt. The clause does not extend to cases in which the bankrupt and other persons who are not bankrupt are jointly in possession of goods and of which he and those persons are jointly reputed owners. Therefore where two partners, one of whom is a minor, commit an act of bankruptcy and the adult partner is adjudged bankrupt, the minor not being capable of being adjudged bankrupt, goods which are in the joint possession of both of them as reputed owners do not pass to the trustee in bankruptcy. It was so held in *Ex parte Dorman (m)*, where the partnership carried on the business of printers, and the goods consisted of machinery, plant and types which were let to the firm along with the premises in which the partnership business was carried on and the landlord claimed the goods as his. Mellish, L.J., in upholding the landlord's claim, said: "We are of opinion that the clause, according to its true construction, is confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner. It is obvious that if the clause was held to apply to every case where goods, with the permission of the true owner, are left in the possession of a bankrupt jointly with others as reputed owners, great injustice would be done in every case in which goods are left in the possession of a firm one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in the possession of the firm of *A.* and *B.*, of whom *A.* becomes bankrupt, but *B.* remains solvent, that the goods should become the property of *A.* divisible among his creditors. Cases have happened in which one member of a most wealthy and solvent firm has, from his private extravagance, become bankrupt, and surely it would be absurd that all persons who had trusted the firm with the possession of their goods should be deprived of their property. Then, does it make any difference that in this particular

(m) (1872) L. R. 8 Ch. App. 51; *Re Bainbridge* (1878) 8 Ch. D 218, 223.

case the person who was in possession of the goods with the bankrupt as reputed owners was an infant? We think it makes no difference. The fact of Clench being an infant did not prevent him from being in possession of the goods jointly with Lake, nor from being one of the reputed owners of the goods. The lease to him was not void, but only voidable, and Lake, having knowingly entered into a contract of partnership with an infant, could not deprive him of his rights as a partner."

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In *Ex parte Dorman*, cited above, one of the partners was a minor, and that was the reason why he could not be adjudged bankrupt. The principle, however, of that decision applies whatever may be the reason why one of the partners cannot be adjudged bankrupt. It was applied in a Calcutta case⁽ⁿ⁾, where it was held that where goods are mortgaged by a firm consisting of two partners one of whom is adjudged insolvent, while the other being in England could not be so adjudged, the title of the mortgagee prevails over that of the Official Assignee. But it was not applied in *Re Hill* (o) which was an earlier Calcutta case. There a firm consisting of Hill and another mortgaged the stock in trade to secure a partnership debt. The other partner subsequently sold his share to one Hogan. Hogan was a Government officer, and it was arranged that the fact of his being a partner should be concealed and that he should remain a dormant partner. While Hogan was in England, Hill filed his petition in insolvency. It was held that Hogan being a dormant partner and the fact of his being a partner having been deliberately concealed, the goods were in the possession, order and disposition of Hill and that the title of the Official Assignee prevailed over that of the mortgagee. This decision, it is submitted, is erroneous. It is inconsistent with the principle of the decision in *Ex parte Dorman*. It is also inconsistent with the principle of the decision in *Reynolds v. Bowley* (p), where it was held that where a firm consists of a dormant partner and an ostensible partner who carries on the business as his own and in his own name, on the bankruptcy of the ostensible partner the share of the dormant partner in the partnership assets does not vest in the trustee in bankruptcy. The motive which actuates a person entering a firm to become a dormant partner cannot make any difference.

551. Mortgage by insolvent.—The goods must be in the possession, order or disposition of the insolvent. Where goods are mortgaged, but the keys of the godown containing the goods are under the agreement to remain with the mortgagor during business hours, the mortgagee having the custody of the keys only at night, the goods are in the order and disposition of the mortgagor, and they will pass to the Official Assignee on his insolvency (q). Where

(n) *In the matter of Morgan* (1881) 6 Cal. 633.
(o) (1881) 9 Cal. 636, note.

(p) (1867) L. R. 2 Q. B. 474.
(q) *Re Shamsuddin Saheb* (1912) 22 Mad. L. J. 441, 15 I. C. 371.

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a trader obtained an advance under an agreement that he should deliver to the lender the next day goods of an equivalent value lying in his godown to secure the loan, and they both put their own locks on the door of the godown, and the borrower absconded the same night, it was held that the goods were not in the possession, order or disposition of the borrower and that the lender and not the Official Assignee was entitled to the goods (r). Goods covered by a railway receipt pledged by the owner to secure an advance against them are not within the possession, order or disposition of the pledgor, and the pledgee, and not the Official Assignee, is entitled to obtain possession of the goods from the railway company on the insolvency of the pledgor (s). See para. 562 below, "secured creditors."

552. At the commencement of the insolvency.—The doctrine of reputed ownership applies only to goods in the possession, order or disposition of the insolvent "at the commencement of the insolvency" (t). If the insolvent has ceased to carry on his trade or business at that date, the present clause will not apply. It is a question of intention to be decided on the evidence, whether the insolvent has permanently ceased to trade or carry on his business, or has temporarily discontinued his trade or business with the intention of resuming it. In the latter case he is still carrying on a trade or business within the meaning of the section (u). Goods which first come into the possession of the insolvent as ostensible owner after the commencement of the insolvency cannot pass to the Official Assignee under the reputed ownership clause (v).

C.—The possession, order or disposition of the insolvent must be "under such circumstances that he is the reputed owner" of the goods.

553. Circumstances giving rise to reputed ownership.—It is necessary, in order that the clause should apply, that the goods should be in the possession, order or disposition, of the insolvent "under such circumstances that he is the reputed owner thereof." Thus where the bankrupts were agents for sale, and they described themselves upon a brass plate affixed at their place of business as "merchants and manufacturers' agents," it was held that the creditors of the bankrupts had notice of the agency sufficient to exclude the operation of the reputed ownership clause (w). It is not sufficient if they describe themselves as such

(r) *In the matter of Bungseedhur Khettry* (1877) 2 Cal. 359.

(s) *Fakeerappa v. Thippanna* (1915) 38 Mad. 664, 30 I. C. 950.

(t) As to when insolvency shall be deemed to have commenced, see P.-t. I. A., s. 51, and Prov. I. A., s. 28 (7).

(u) See *Ex parte Salaman* (1882) 21 Ch. D. 394, a case under s. 6 of the

Bankruptcy Act, 1869.

(v) See *Lyon v. Weldon* (1824) 2 Bing. 334, 130 E. R. 334.

(w) *Ex parte Bright* (1879) 10 Ch. D. 566. See also *Ex parte Wingfield* (1879) 10 Ch. D. 591, 594, per James, L. J.; *Ex parte Watkins* (1873) L. R. 8 Ch. App. 520, 530, per Lord Selborne, L. C.

merely upon letters or invoices used by them, though it is an element which cannot be left out of consideration in dealing with the question of reputed ownership (x). Para. 553.

The most authoritative pronouncement on the subject of reputed ownership is that of Lord Selborne in *Ex parte Watkins* (y). The bankrupts in that case carried on business in Liverpool as wine and spirit merchants. Prior to their bankruptcy they had sold certain butts of whisky that were then lying in their bonded warehouse to one Watkins. The goods were left there for the convenience of the purchaser, to whom the vendors had given a delivery warrant in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as warehousemen, but it was proved to be the usual custom of the wine and spirit trade in Liverpool for goods sold in bond to remain in the possession or under the control of the vendors, in their bonded warehouse, in which they were at the time of sale, until they were required by the purchaser for use. While the butts were still lying in the warehouse, the vendors were adjudged bankrupt. It was held that the existence of a custom of this nature, shown to be well known among persons concerned in the wine and spirit trade, excluded the doctrine of reputed ownership, and that the goods did not pass to the trustee in bankruptcy. In that case Lord Selborne said: "The principle of the law on this subject is well expressed in the preamble of the statute (21 Jac. 1, c. 19, s. 10), to which reference has been made in the argument and which particularly contemplates the case of persons selling goods and permitted to remain in possession of them, so that they can obtain credit as if the ownership had not been changed. That being the principle, two things are necessary to bring any case within it. First, that there should be what is called the order and disposition of the property; and secondly, that there should be in point of fact, reputed ownership arising from the circumstances. There is no inflexible rule of law that because a man who was once the owner of goods and has sold them remains in possession of them he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignee; but it is always a question of fact whether or no the circumstances are such as to create that reputation.

"What, then, are the principles applicable to the determination of that question? Much of the argument seems to me to have proceeded on a fallacious application of the expressions 'knowledge of the world' and

(x) *Re Watson & Co.* (1904) 2 K. B. 753, 758.

(y) (1873) L. R. 8 Ch. App. 520, 528.
See also *Ex parte Vaux* (1874) L.

R. 9 Ch. App. 602, where the butts were in the warehouse of a third party.

Para. 553 'known to the public'. The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession. Now, if those be the sound principles, how stands the present case? It is and must be conceded that if the bankrupts had carried on the business of general warehousemen no persons dealing with them would have had a right to say that goods were in the reputed ownership of the bankrupts because they were in the bankrupts' warehouse; for if they troubled themselves to inquire into the matter, the information they would have received must have been that the goods were in a warehouse which was kept by the bankrupts for the reception of other people's goods as well as their own, so that no inference whatever as to the ownership of the goods could be drawn from their situation. In such a case it will not be disputed that it would have made no difference if some of the goods in that warehouse, and actually warehoused there for the real owner for the time being, had been previously the goods of the bankrupts, and had been sold by them to the real owner. Now it is, I think, clear, on the evidence, that these bankrupts were not generally warehousemen; but when we look at the custom of their business it seems to me to be clearly proved, that though not general warehousemen, they were warehousemen for such of their customers as purchased wines and spirits from them, and that this was the ordinary course and usage of their business, which was carried on upon a very large scale. Is there anything in such a course of business tending to mislead the general public or persons having dealings with the traders, provided it be known? Suppose the bankrupts

had made this course of dealing known by putting up a board over the door, saying, 'This warehouse is kept by *Couston & Co.* for the purpose of warehousing their own goods and the goods which their customers have bought from them,' I suppose it would not seriously have been contended that anybody would have been entitled to say that the fact of goods being in that warehouse carried with it a reputation of ownership in the bankrupts. Though the notice would not distinguish the goods, or go into their history, yet everybody being aware that there were goods of other people there, would be bound to know that any particular goods might be the goods of other people and could not possibly say that all the goods were in the reputed ownership of the bankrupts. It was accordingly laid down by Sir James Mansfield in *Thackthwaite v. Cock*, that if the facts are such that those who deal with the bankrupts may see and know that the goods may not be the property of the bankrupts, that is enough to exclude the doctrine of the reputation of ownership. Para. 553

"That being so, the sole question is, whether that custom or course of trade is so well known as to make the reputation applicable to these goods the reputation of goods subject to such a custom and course of trade; for in that trade the knowledge of that custom is equivalent to the knowledge of the announcement which the board over the door would have given in the case I have supposed. If there had been such a board over the door, all the world would not have gone to read it, but anyone who had troubled himself to ascertain the facts would have ascertained the character of that warehouse, and he must ascertain the facts relating to it before he can be heard to say that he is to have any benefit of a reputation arising from the fact of goods being warehoused there. A custom known to the whole trade and to all persons dealing with the trade surely is as well advertised, perhaps better advertised, than it would be by a notice over the door. Now the evidence in this case is distinct that this particular custom is an old well established custom, not of this individual firm merely, but of the trade which is carried on by this firm in common with others. It has been long established, and is well known to all the persons in the trade, and also in point of fact, in this particular case, known to all the parties who had been dealing with this particular firm. It seems to me that no evidence could be more completely sufficient, if we are not bound by any contrary authority, to show that every person who took the trouble to acquire any knowledge of those facts on which the reputation of ownership connected with the lying of goods in this bonded warehouse depends must have become informed of this custom. On the evidence I think we ought to take it that everybody was informed. And it is to be observed that this is not in the least like a case of goods in a retail shop. They are goods in a bonded warehouse, which can have no reputation of ownership at all connected

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with them in a general way, except such reputation as is to be inferred from the character of the bonded warehouse and the business carried on in it. An individual might indeed have been deceived, but only by one of the bankrupts taking him into the warehouse and showing the goods as goods of the firm; and the possibility of this being done cannot enter into consideration upon the question of reputed ownership."

554. Evidence of reputation of ownership.—Reputation of ownership is always a question of fact depending on the circumstances of each case (z). Almost every kind of possession, in the case of goods, is some evidence of ownership, however slight. Possession alone, however, is not the determining factor. The possession must be with the consent of the true owner. Where goods which originally belonged to the insolvent continue in his possession notwithstanding change of ownership, as where goods which belonged to the insolvent are sold by him and he hires them back from the purchaser, the fact of continuance of possession is *prima facie* evidence of reputation of ownership and of the consent of the true owner thereto, and it lies upon the true owner to show that the circumstances under which the insolvent continued in possession were such as to exclude reputation of ownership. If, however, the goods did not originally belong to the insolvent, as where machinery is let to a person who had never been the owner, it may be necessary for the Official Assignee to give other evidence of the fact; in such a case, the mere possession might not be sufficient to induce others to consider him as owner (a). See also para. 563 below.

555. Initials or name on goods.—A person may buy goods from one who afterwards becomes an insolvent, mark them with his name or initials, and then leave them in the possession of the vendor. Is this sufficient in itself to exclude reputation of ownership? In *Lingard v. Messiter* (b), where the purchaser marked the goods with his initials, the goods being machinery, it was held that it was not, it not being sufficient evidence of the notoriety of the change of ownership. Reputation of ownership may be excluded by the existence of a notorious custom in the particular trade. It was accordingly held in *Ex parte Marrable* (c), where a purchaser of wines marked them with his seal, and kept them in a bin in the vendor's cellar, that the goods did not pass on the bankruptcy of the vendor to his assignees in bankruptcy. Similarly a custom among coal merchants to hire barges and have their own names painted thereon pursuant to a police regulation, will exclude the reputation of ownership arising from the name appearing on the barge and the barge will not, on the bankruptcy of the hirer, pass to his trustee (d).

555A. Affixing of board by mortgagee.—The affixing of a board by a mortgagee of goods at the place of business of the mortgagor stating that he is mortgagee in possession takes the goods out of the reputed ownership of the mortgagor (d1).

(z) *Hamilton v. Bell* (1854) 10 Ex. 545, 158 E. R. 554.

(a) *Lingard v. Messiter* (1823) 1 B. & C. 308, 107 E. R. 115; *Ex parte Lovering* (1874) L. R. 9 Ch. App. 621; *Ex parte Brooks* (1883) 23 Ch. D. 261.

(b) (1823) 1 B. & C. 308, 107 E. R. 115.

(c) (1824) 1 G. & J. 402.

(d) *Watson v. Peache* (1834) 1 Bing. N.C. 327, 339, 131 E. R. 1143, 1148.

(d1) See *Mercantile Bank of India v. Official Assignee, Madras* (1916) 39 Mad. 250, 35 I. C. 942.

556. Notoriety of change of ownership.—A sale by public auction in execution of a decree has been held to give sufficient notoriety to the change of ownership so as to exclude reputation of ownership. Therefore, where a purchaser of goods in execution of a decree lets them to the judgment-debtor at a *bona fide* rent, and the judgment-debtor afterwards becomes insolvent, the goods are not in the reputed ownership of the insolvent, and the purchaser's title will prevail as against that of the Official Assignee (e). An attempted sale by the mortgagee, the goods not being advertised to be sold as his, is not sufficient (f).

557. Usage of trade.—A custom of trade to leave the goods of one man in the possession of another excludes the reputation of ownership (g). "If there is a custom of trade so notorious that all persons engaged in the trade, or who give credit to those who are engaged in it, know that the possession of the goods by the trader does not necessarily show that he is the owner of them, then it cannot be said that the creditor gives credit on the faith of the trader's ownership of the goods which are in his possession and the provisions of sec. 15 [of the Bankruptcy Act, 1869] do not apply" (h). "When the existence of a custom notorious in a particular trade or business is proved, the effect of which is that every one who knows the custom knows the articles to which it is applicable, and which are in the place in which the trade or business is carried on, *may or may not be* the property of the person who is carrying on the trade or business—may or may not be held by him for other persons—then the doctrine of reputed ownership is absolutely excluded as to all the articles which are within the scope of the custom" (i). In *Hamilton v. Bell* (j), where the question arose whether clocks and watches sent to a clock and watch maker for repairs were within his reputed ownership, Alderson, B., said: "In this case the clocks were left in a shop where it is notorious that persons leave their clocks to be repaired; how then can we draw the conclusion that the bankrupt was the reputed owner of them? When we find that the shopkeeper is not the owner of even the larger proportion of the goods in his shop, how can we conclude that he is the owner of any?" In the same case Pollock, C. B., is reported to have said in the course of the argument: "I cannot imagine that any person going into a watchmaker's shop in London, where clocks are both sold and repaired, could suppose that all the clocks and watches which he sees there are the property of the

(e) *Kidd v. Rawlinson* (1800) 2 Bos. & P. 59, 126 E.R. 1155; *Lingard v. Messiter* (1823) 1 B. & C. 308, 313, 107 E.R. 115; *In the matter of Bungseedhar Khettry* (1877) 2 Cal. 359, 364.
(f) *Reynolds v. Hall* (1859) 4 H. & N. 519, 157 E.R. 943. See also *In the matter of R. Brown* (1886) 12 Cal. 629, 637-638.

(g) *Hamilton v. Bell* (1854) 10 Ex. 545, 156 E. R. 554; *Ex parte Watkins* (1873) L. R. 8 Ch. 520.
(h) *Ex parte Wingfield* (1879) 10 Ch. D. 591, 593-594, per Jessel, M. R.
(i) *Ex parte Turquand* (1885) 14 Q. B. D. 636, 643, per Earl of Selborne, L. C.
(j) (1854) 10 Ex. 545, 156 E. R. 554.

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shopkeeper." Similarly, if the bankrupt carries on business as a general warehouseman, no person dealing with him would have a right to say that goods were in the reputed ownership of the bankrupt because they were in the bankrupt's warehouse, for it is notorious that general warehousemen keep in their warehouse other people's goods as well as their own (*k*). A book-seller is not the reputed owner of books sent to him for sale on commission (*l*). Nor is a horse-dealer the reputed owner of horses sent to him for sale or return (*m*). Iron safes sent by a wholesale dealer to a retail dealer for sale or return or to sell as his agent are not in the reputed ownership of the retail dealer (*n*). A custom exists in the printing trade to let printing machinery on hire so as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the hirer (*o*). The custom of hotel-keepers to hire furniture is so notorious as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the hotel proprietor (*p*). This custom does not extend to furniture in the possession of traders generally, *e.g.*, a wholesale grocer (*q*), but it extends to the hiring of pianos on the three years' system (*r*). Where a custom of letting articles on hire is proved, it is not material to inquire whether the name of the owner or any special label appears on the article let by him (*s*).

A custom of trade by which goods are left in the possession of persons to whom they do not belong must, in order to exclude the reputation of ownership, be a custom known not only to persons in the same trade, but to others who are likely to be creditors (*t*). It must be one known in business generally, and not merely to persons dealing in a particular market (*u*). Such custom may be proved either by reported cases or by evidence of the custom as on a question of fact (*v*). The burden of proving the custom lies on the person who sets it up (*w*). In an Indian case an attempt was made to prove a custom for retail dealers in jewellery to receive articles for sale on commission, but the attempt failed (*x*).

D.—Consent of true owner to reputation of ownership.

558. The true owner must consent.—The doctrine of reputed ownership contemplates the existence of a true owner, that is, a person other

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| <p>(<i>k</i>) <i>Ex parte Watkins</i> (1873) L. R. 8 Ch. App. 520, 529, per Lord Selborne, L. J.</p> <p>(<i>l</i>) <i>Whitfield v. Brand</i> (1847) 16 M. & W. 282, 153 E. R. 1195; <i>Ex parte Greenwood</i> (1862) 6 L. T. 558.</p> <p>(<i>m</i>) <i>Ex parte Wingfield</i> (1879) 10 Ch. D. 591.</p> <p>(<i>n</i>) <i>Re Lock</i> (1891) 8 Mor. 51.</p> <p>(<i>o</i>) <i>Re Thackrah</i> (1886) 5 Mor. 235.</p> <p>(<i>p</i>) <i>Cravcour v. Saller</i> (1881) 18 Ch. D. 30; <i>Ex parte Turquand</i> (1885) 14 Q. B. D. 636.</p> | <p>(<i>q</i>) <i>Ex parte Brooks</i> (1883) 23 Ch. D. 261; <i>Re Tabor</i> (1920) 1 K. B. 808; <i>Re Kaufman Segal and Domb</i> (1923) 2 Ch. 89.</p> <p>(<i>r</i>) <i>Re Blanshard</i> (1878) 8 Ch. D. 601.</p> <p>(<i>s</i>) (1878) 8 Ch. D. 601, 604, <i>supra</i>.</p> <p>(<i>t</i>) <i>Re Hill</i> (1875) 1 Ch. D. 503, note; <i>Thackthwaite v. Cock</i> (1811) 3 Taunt. 487, 128 E. R. 193.</p> <p>(<i>u</i>) <i>Re Goetz, Jonas & Co.</i> (1898) 1 Q. B. 787.</p> <p>(<i>v</i>) <i>Ex parte Powell</i> (1875) 1 Ch. D. 501.</p> <p>(<i>w</i>) <i>Re Horn</i> (1886) 3 Mor. 51, 56.</p> <p>(<i>x</i>) <i>Re Murray</i> (1878) 3 Cal. 58.</p> |
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than the insolvent, to whom the goods belong and who permits the insolvent to have the possession, order or disposition of the goods as reputed owner. The true owner must consent to the insolvent having the possession, order or disposition of the goods in his trade or business as reputed owner. Unless such consent is proved the reputed ownership clause does not apply. As stated by Baron Parke in *Lord v. Green* (y): "There must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership as such." Consent implies knowledge and capacity to consent. A married woman restrained from anticipation, or an infant cannot consent (z).

559. Nature of true owner's consent.—To bring a case within the reputed ownership clause, it is not enough that the insolvent is in possession of the true owner's goods. It is necessary—

- (a) that the insolvent should be in possession with the consent of the true owner ;
- (b) that the consent should be to the possession of goods in the insolvent's trade or business ; and
- (c) that the true owner should also have consented to the reputation of ownership.

(a) Goods obtained by an insolvent by fraud (a), and goods sent to him by mistake (b), are not in his possession with the true owner's consent, and they will not be regarded as being in his reputed ownership unless the goods were left in his possession for a considerable time after the fraud or mistake was discovered.

(b) The consent of the true owner must be given not only to the goods being in the possession of the insolvent, but also to their being used "in his trade or business." If a man consents to the user of his goods in the trade or business of another, he knows, or ought to know, that he runs the risk of losing those goods by the operation of the reputed ownership clause. But if he only consents to the user of goods for private and non-business purposes, then he is not exposed to the confiscatory provisions of this clause merely because the insolvent, without his knowledge or consent, has used those goods in and for his trade or business. A man, of course, cannot be said to consent to what he does not know. Thus where a car, which was in its make and structure a pleasure car was sold, under a hire and purchase agreement, for private use as a pleasure car, but was sometimes used by the purchaser, without the vendor's knowledge or consent, for business purposes,

(y) (1846) 15 M. & W. 216, 153 E. R. 828; *Smith v. Hudson* (1865) 34 L. J. Q. B. 145, 151.
(z) *Re Rowbone* (1857) 3 K. & J. 476, 69 E. R. 1197; *Ex parte Ford* (1876) 1 Ch. D. 521, 528; *Re*

Mill's Trusts (1895) 2 Ch. 504.
(a) *Lord v. Green* (1846) 15 M. & W. 216, 153 E. R. 828; *Sinclair v. Stevenson* (1825) 2 Bing. 514, 517, 130 E. R. 404, 406.
(b) *Ex parte Barnett* (1876) 3 Ch.D. 123.

Para. 559 it was held that the reputed ownership clause did not apply and that the car did not pass on the bankruptcy of the purchaser to his trustee in bankruptcy (c).

(c) Further the consent must be to the reputation of ownership or to the circumstances from which it is inferred. "The true owner must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise." The question in each case thus will be: "Did the true owner consent to the possession by the insolvent under such circumstances that persons dealing with him would be entitled to assume that the insolvent was the owner of the goods in his trade or business?" It is obvious that in deciding the question as to the consent of the true owner, the true relation of the parties must not be omitted from consideration. Thus where a wholesale firm of silversmiths sent samples of plated goods to a firm of commission agents for displaying in their show cases, and the commission agents did not themselves supply the goods, except that in cases of urgency they might sell the samples, but simply made contracts for the sale of goods with their customer and then introduced the customer to the silversmiths who supplied him from their warehouse with goods corresponding to the samples, it was held that the commission agents were not in possession of the samples as reputed owners thereof with the consent of the true owner and that the goods did not pass on the insolvency of the commission agents to the Official Assignee (d).

Dealing with the question of consent, Christian, L.J., a very distinguished Irish Judge observed as follows (e):—"No interest whatever in the policy passed to the assignees by the vesting operation of the Bankruptcy Act. Assignees step into the shoes of the bankrupt. Nothing passes to them but what was beneficially the bankrupt's own at the time of the bankruptcy. Nevertheless the assignees assert that the order and disposition clause [sec. 313 of the Irish Bankruptcy Act, 1857] enables the Court of Bankruptcy to confiscate by a special order this, the admitted property of those two men, for payment of the debt of their assignor. Without going all the way with Counsel for the appellant in calling that clause a penal one, we may admit that it is an exceedingly harsh if not an unscrupulous one. It is probably the only instance in our law in which, not only purposely, but avowedly, the property of one man is laid hold of to answer the debts of another. It dates back to the time of James I, if not earlier, and is an example of what most of us have occasion to note, that both the Parliaments and the judges of those

(c) *Lamb v. Wright & Co.* (1924) 1 K.B. 857.

(d) *Re Watson & Co.* (1904) 2 K. B. 753; *Re Kaufman Segal and Domb* (1923) 2 Ch. 89, 93-94. See

also *Ex parte White* (1871) L. R. 6 Ch. App. 397.

(e) *Re Hickey*, 10 I.R. Eq. 129, cited in *Colonial Bank v. Whinney* (1886) 11 A. C. 426, 444.

older times were bolder in initiative than their modern successors. Surveying the conditions with which the exercise of this exceptional and questionable power has been hedged round by this statute, it is impossible to avoid seeing that of all its requirements the most distinctive and central is 'the consent and permission of the true owner.' All the others may combine. The goods may be in the possession of the bankrupt, they may be in his order and disposition, he may be the reputed owner of them; but unless all this has been sanctioned by the consent and permission of the true owner, the clause rests as a dead letter. And it is this alone which redeems this law from the charge of naked confiscation. As the *mens rea* is essential for incurring the punishment of guilt, so the *mens volens* is essential for incurring the forfeiture imposed by this order and disposition clause."

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The true owner may determine his consent to the reputation of ownership and by so doing may take the goods out of the possession, order and disposition of the insolvent. See para. 573 *et seq.*

560. The insolvent must not be the true owner.—There must be a true owner and an apparent owner. The insolvent must be the apparent owner, and he must not be the true owner or as much the true owner as another person (*f*). Thus where a partnership consists of an ostensible partner and a dormant partner, and the ostensible partner is allowed to carry on the partnership business as his own in his name, the share of the dormant partner in the partnership property will not pass on the insolvency of the ostensible partner to the Official Assignee (*g*).

Illustration.

A brother and sister carry on business in partnership in the brother's name. The sister is a dormant partner, and the business is carried on by the brother ostensibly as his own. The brother absconds and is adjudged bankrupt. The sister's share in the partnership stock does not pass to the Official Assignee. The brother was not the apparent or reputed owner of the partnership stock. He was as much the true owner of the stock as the sister was. Moreover, he was not in sole possession of the partnership stock. He was in possession thereof jointly with his sister (see para. 560 above): *Reynolds v. Bowley* (1867) L. R. 2 Q.B. 474. But this does not apply where one partner allows his own goods (as distinguished from partnership goods) to be employed in the partnership business. In such a case there is a true owner, that is, the partner to whom the goods belong, and there are also apparent owners, that is, the members of the firm including the partner who owns the goods. The goods being in the apparent or reputed ownership of the firm, they will be treated on the insolvency of the partners as their joint estate and divided among the creditors of the firm. The creditors of the partner who owns the goods cannot claim them as the separate estate of that partner and as such divisible amongst them in the first instance (*h*).

(*f*) *Hamilton v. Bell* (1854) 10 Ex. 545;
156 E. R. 554; *Reynolds v.*
Bowley (1867) L. R. 2 Q. B. 474.

(*g*) (1867) L. R. 2 Q. B. 474, *supra*.
(*h*) *Ex parte Hare* (1835) 1 Dea. 16.

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561. True owner.—The doctrine of reputed ownership contemplates the existence of a “true owner” to whom the goods belong and who permits the insolvent to have the possession, order and disposition of the goods as “apparent owner”. The doctrine does not apply unless there is a real or true owner distinct from the apparent owner. The expression “true owner” stands in antithesis to “reputed owner”. For the purposes of the section the “true owner” is the person who is entitled to determine the appearance of ownership in the insolvent (i) [para. 573].

A true owner may be a full owner as where he has lent his goods for use to the insolvent, or let them out on hire to him, or sent them to his shop for sale, or having bought the goods from the insolvent has allowed the insolvent to continue in possession thereof. The true owner may also be a qualified owner, e.g., a mortgagee. The mortgage may be legal or equitable [para. 562].

562. Secured creditors.—A mortgagee is the true owner of the goods mortgaged to him (j), whether the mortgage is legal or equitable (k). A charge on goods or a hypothecation of goods stands on the same footing as a mortgage (l). The mortgagee being the true owner, it is clear that if he allows the mortgagor to remain in possession of the goods as reputed owner until his insolvency, the goods will pass to the Official Assignee, and the mortgagee will lose his security (m). This will be so, although by agreement between the parties the mortgagee has precluded himself from taking immediate possession of the goods and determining the appearance of ownership in the mortgagor. Thus if goods are assigned by way of mortgage, and it is provided by the deed of mortgage that the mortgagor should be entitled to remain in possession of the goods until default in payment is made, then if the mortgagor become insolvent before default, the goods will pass to the Official Assignee. The mortgagee having put himself of his own accord in a position in which he has no immediate right to the possession of the goods, he must be deemed to have consented to the reputed ownership of the mortgagor until the happening of the default (n). Upon the same principle if a pawnee of goods delivers them back to the pawnor for sale on commission at the

(i) *Punithavelu Mudaliar v. Bhashyam Ayyangar* (1902) 25 Mad. 406, 411, 416.

(j) *Ryall v. Rowles* (1749) 1 Ves. Sen. 348, 27 E. R. 1074.

(k) *Ex parte Union Bank of Manchester* (1871) L. R. 12 Eq. 354; *Ex parte Barry* (1873) L. R. 17 Eq. 113; *Colonial Bank v. Whinney* (1886) 11 App. Cas. 426, 434.

(l) (1902) 25 Mad. 406, 414-416, *supra*; *In the matter of Ambrose Summers* (1896) 23 Cal. 592; *Official Assignee v. Mahomed* (1923) 1 Rang. 153, 74 I. C. 919, ('24) A. R. 27; *Aburubammal v. Official Assignee* (1924) 47 Mad.

215, 79 I. C. 809, ('24) A. M. 214; *Mercantile Bank of India v. Official Assignee, Madras* (1916) 39 Mad. 250, 252, 260, 35 I. C. 942.

(m) *Freshney v. Wells* (1857) 26 L. J. Ex. 129; *In the matter of Marshall* (1881) 7 Cal. 421. This is the only ground on which the decision can be supported.

(n) *Shackman v. Miller* (1862) 31 L. J. C. P. 309; *Ex parte Harding* (1873) L. R. 15 Eq. 223; *Re Ginger* (1897) 2 Q. B. 461; *Hollin Shead v. P. & H. Egan, Ltd.* (1913) A. C. 564.

pawnor's shop, the goods will pass to the Official Assignee on the insolvency of the pawnor (o). See para. 551 above, "Mortgage by insolvent." As to cases governed by the Provincial Insolvency Act, see para. 579 below.

563. Trustees.—Property held by the insolvent on trust for others does not pass on his insolvency to the Official Assignee. A trustee is the "true owner" of trust property within the reputed ownership clause (p). It cannot be said of such property that it is in the reputed ownership of the insolvent with the *consent* of the beneficiaries, for so long as the trustee deals with the trust property *in a manner consistent with the trusts*, the beneficiaries have no right to disturb his possession (q). If, however, the beneficiaries permit the trustee to deal with the trust property *in a manner inconsistent with the provisions of the trust* the property will be deemed to be in his possession as the "reputed owner" thereof with the consent of the beneficiaries, and it will pass on the insolvency of the trustee to the Official Assignee (r). But the trustee does not become reputed owner because the trust property consists at the date of his insolvency of an investment not authorised by the deed of trust, provided the investment was not with the consent of the beneficiaries. "Whatever be the nature of the investment into which the trust money invested by a trustee can be traced, unless the *cestuis que trust* are affected by the consent which the statute contemplates for the creating of reputed ownership, I apprehend it to be clear law that the money so invested does not pass on bankruptcy to the assignees, but remains the property of the person for whom it was originally held" (s).

A trustee, as stated above, is "the true owner" of property subject to the trust, but this is so only if he has accepted the trust. If he has declined the trust or has not executed the trust deed, the beneficiaries are "the true owners." The apparent owner in such a case will be the settlor himself, and if the beneficiaries consent to the trust property being in his order and disposition as reputed owner, the property will be divided on his insolvency among his creditors (t).

The rule that trust property does not pass under the doctrine of reputed ownership does not apply to the case of a fraudulent trust. Thus if there be no *bona fide* reason for the creation of a trust, and the forms of a trust have been gone through only in order to conceal the true ownership of the property, it is an abuse of the forms of the trust, for the purpose of creating a reputation of ownership, and upon the insolvency of the so-called trustee, the property will pass to the Official Assignee as being within his order and disposition (u).

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| <p>(o) <i>Re Murray</i> (1878) 3 Cal. 58, criticized adversely in <i>Official Assignee v. Mohamed</i> (1923) 1 Rang. 153, 159, 74 I. C. 919, ('24) A. R. 27, but on grounds which the present writer is unable to appreciate. There was no question of demand of possession in the Calcutta case.</p> <p>(p) <i>Joy v. Campbell</i> (1804) 1 Sch. & L. 328; <i>Re Nripendra Kumar Bose</i> (1929) 56 Cal. 1074.</p> | <p>(q) <i>Kitchen v. Ibbelton</i> (1873) L. R. 17 Eq. 64, at p. 49.</p> <p>(r) <i>Fox v. Fisher</i> (1819) 3 B. & Ald. 135, 106, E. R. 612.</p> <p>(s) <i>Great Eastern Railway Co. v. Turner</i> (1872) L. R. 8 Ch. App. 149.</p> <p>(t) <i>Re Mills' Trusts</i> (1895) 2 Ch. 564.</p> <p>(u) <i>Great Eastern Railway Co. v. Turner</i> (1872) L. R. 8 Ch. App. 149, 154; <i>Ex parte Burbridge</i> (1835) 1 Dea. 131.</p> |
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564. Executors and administrators.—Goods in the hands of an executor (*v*), or administrator (*w*), are exempt from the reputed ownership clause like other trust property; but if the persons beneficially interested in the goods allow him to use them as his own, they will be deemed to be in his reputed ownership in the event of his insolvency (*x*).

565. Executor de son tort.—Goods in the hands of an executor *de son tort* are exempt from the reputed ownership clause to the same extent as other trust property (*y*).

566. Beneficiaries.—Where the beneficiaries are in possession of trust property, and such possession is *in accordance with the trust*, they are not in possession *with the consent* of the trustee who is the true owner, and the reputed ownership clause does not apply (*z*). It is otherwise if the trustee consents to the goods being in the order and disposition of the insolvent beneficiaries *adversely to the trust* (*a*).

567. Building contracts.—In the case of building contracts the question whether the owner of the building or the builder is the true owner of the building materials lying on the land depends on the construction of the contract between the parties. Where the contract provided that all loose materials brought on the land by the builder shall be deemed to be annexed to the freehold, it was held that the owner of the building was the true owner of the materials and the materials were in the reputed ownership of the builder with the consent of the true owner, and passed on the bankruptcy of the builder to the trustee (*b*). In another case where the contract did not give the owner of the building an immediate right of property in the loose materials, but gave him the right to forfeit them in certain events, it was held that the builder, and not the building owner, was the true owner, and that the owner of the building could forfeit the goods notwithstanding the bankruptcy of the builder (*c*).

568. Partners.—In the case of partners, the partnership property is applicable in the first instance in payment of the partnership debts, and the separate property of each partner is applicable in the first instance in the payment of his separate debts. This rule is subject to the doctrine of reputed ownership so that the separate property of an individual partner in the reputed ownership of the firm will be treated as partnership property, as where one partner puts his own furniture for the use of the firm into

(*v*) *Re Fells* (1876) 4 Ch. D. 509.

(*w*) *Kitchen v. Ibbetson* (1873) L. R. 17 Eq. 46.

(*x*) L. R. 17 Eq. 46, *supra*.

(*y*) *Fox v. Fisher* (1819) 3 B. & Ald. 135, 106 E. R. 612.

(*z*) *Joy v. Campbell* (1804) 1 Sch. & L. 328, per Lord Redesdale;

Ex parte Martin (1815) 2 Rose, 331; *Earl of Shaftesbury v. Russell* (1823) 1 B. & C. 666, 107 E. R. 244.

(*a*) *Darby v. Smith* (1798) 8 T. R. 82, 101 E. R. 1278; *Caffrey v. Darby* (1801) 6 Ves. 488, 31 E. R. 1159.

(*b*) *Re Weibking* (1902) 1 K. B. 713.

(*c*) *Re Keen & Keen* (1902) 1 K. B. 555.

premises occupied entirely for the purposes of the partnership business (*d*), and partnership property in the reputed ownership of an individual partner will be treated as his separate property, as where one partner is in exclusive possession of partnership property for purposes unconnected with the partnership business. If he is in possession of partnership property for purposes connected with the partnership business, such property cannot be treated as his separate property, for his possession then is that of a partner—of a true owner—and not of an apparent or reputed owner. This happens when a partnership consists of a dormant partner and an ostensible partner who carries on the partnership business in his own name. In such a case the whole partnership property will not, on the insolvency of the ostensible partner, be divisible among his creditors, but only his share in the partnership property (*e*).

The rule that the separate property of one partner in the reputed ownership of the firm will be treated on the insolvency of the partners as partnership property and applied in payment of the partnership debts, applies also to an ostensible partnership, as where a firm belongs exclusively to one person, but he holds himself out as partner with another. Thus if a father who is the real owner of a business carries it on in the name of himself and his son, and the son who is not in fact a partner manages the business, orders goods and draws cheques as principal in the name of the firm, the case is one of an ostensible partnership, and the assets of the business, though belonging to the father, will on the insolvency of the father and the son be treated, by virtue of the doctrine of reputed ownership, as the joint estate of the two and divisible among the creditors of the firm. The creditors of the father cannot claim them as his separate property. This rule does not apply unless there is an ostensible partnership held out to the world. It must be shown that the son was held out as a partner to the world. It will not do to show that some one creditor of the firm, or two or three creditors, might have received information that the son was liable as a partner (*f*).

569. Factors and agents for sale.—Goods of the principal in the hands of factors or agents for sale are held by them on trust for the principal, and they will not pass on their insolvency to the Official Assignee (*g*), where the relationship of principal and factor is notorious (*h*). But goods in the hands of a factor or an agent for sale may, on his insolvency, pass to the Official Assignee, if the principal has permitted

- (*d*) *Ex parte Hare* (1835) 1 Dea. 16.
(*e*) *Reynolds v. Bowley* (1867) L. R. 2 Q. B. 474.
(*f*) *Ex parte Hayman* (1878) 8 Ch. D. 11; *Re Rowland and Crankshaw* (1866) L. R. 1 Ch. App. 421; *Ex parte Sheen* (1877) 6 Ch. D. 235.
(*g*) *Taylor v. Plumer* (1815) 3 M. & S. 562, 576, 105 E. R. 721, 726.
(*h*) *Ex parte Boden* (1873) 28 L. T. 174 ;

Re Fawcus (1876) 3 Ch. D. 795; *Ex parte Bright* (1879) 10 Ch. D. 566; *Re Murray* (1878) 3 Cal. 58, at p. 60. As to whether notoriety need in all cases be shown, see *Mace v. Cadell* (1774) 1 Cowp. 232, at p. 233, 98 E. R. 1060; *Whitfield v. Brand* (1847) 16 M. & W. 282, at p. 286, 153 E. R. 1195, 1197.

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the agent to have a possession not consistent with the ordinary usages of trade, and raising a reputation of ownership in the insolvent (*i*).

570. Bailee for safe custody.—Where property is left with a person for safe custody only, it is not in his order or disposition with the consent of the true owner, and it will not pass to the Official Assignee on his bankruptcy (*j*).

571. Sale or return.—Goods sent to a person on sale or return or on approval will not pass on his insolvency to the Official Assignee, unless they have remained in his possession for an unreasonably long period, in which case they will pass to the Official Assignee as the property of the insolvent and not as property in his reputed ownership (*k*). A well-known custom for goods to be sent on sale or return will exclude the reputation of ownership (*l*).

572. Hire-purchase agreement.—In the absence of a custom goods in the hands of a hirer under a hire-purchase agreement will pass to the Official Assignee under the reputed ownership clause (*m*).

E.—Determination of possession and of consent to reputation of ownership.

573. Possession and consent when may be determined.—The doctrine of reputed ownership, as we have seen, does not apply unless the insolvent is in possession of the goods *at the commencement of the insolvency* (para. 582) as reputed owner with the consent of the true owner. It follows that if the true owner determines the possession of the insolvent or withdraws his consent to the reputation of ownership *before* the commencement of the insolvency, though it may be on the same day (*m1*) the goods cease to be in the possession, order and disposition of the insolvent and the title of the true owner will prevail against the Official Assignee. The section, however, of the Presidency-towns Insolvency Act (sec. 51) which relates to the commencement of the insolvency, is controlled by sec. 57 of the Act which relates to protected transactions. Therefore, even

(*i*) Williams on Bankruptcy, 13th Ed., p. 230.

(*j*) *Webb v. Whinney* (1868) 18 L. T. 523.

(*k*) *Ex parte Wingfield* (1879) 10 Ch. D. 591, 593; *Smith v. Hudson* (1865) 34 L. J. Q. B. 145, at p. 151, per Blackburn, J.; *Gibson v. Bray* (1817) 8 Taunt. 76, 129 E. R. 311, where goods were sent on eve of bankruptcy; *Livesay v. Hood* (1809) 2 Camp. 83, 170 E. R. 1089, where the goods remained with the bankrupt for nearly a month; *Ex parte Clarke* (1877) 37 L. T. 509. See Sale of

Goods Act, 1893, s. 18, r. 4.

(*l*) *Ex parte Wingfield* (1879) 10 Ch. D. 591 (horses sent by a customer to a horse dealer); *Re Lock* (1891) 8 Mor. 51 (iron safes); *Ex parte Woodward* (1886) 54 L. T. 683 (carpets).

(*m*) See *Ex parte Brooks* (1883) 23 Ch. D. 261; *Re Tabor* (1920) 1 K. B. 808; *Re Kaufman Segal and Domb* (1923) 2 Ch. 89.

(*m1*) *Green v. Laurie* (1874) 1 Ex. 335, 145 E. R. 142; *Ex parte Harris* (1872) L. R. 8 Ch. App. 48; *Re Eslick* (1876) 4 Ch. D. 496.

if the goods are in the possession of the insolvent at the commencement of the insolvency, or, where the goods consist of trade debts, the debts are in his order or disposition, yet if the true owner, not having notice of the presentation of any insolvency petition by or against the debtor, takes possession of the goods (*n*), or demands the goods (*n1*), or gives notice of assignment of the debt to the insolvent's debtor (*n2*), before the date of the order of adjudication and *bona fide*, the goods and the debts as the case may be will be taken out of the order and disposition of the insolvent, and the title of the true owner will prevail against the Official Assignee. A seizure of goods under and irrevocable license to seize (*o*), or under a letter of lien given by the debtor, stands on the same footing, all these being "dealings for valuable consideration" (*o1*), within the meaning of sec. 57. In short, if the conditions of sec. 57 are complied with, the true owner is protected against the relation back of the title of the Official Assignee to the first available act of insolvency as if possession had been taken or consent revoked before the commencement of the insolvency. The High Court of Madras has, however, held that the taking of possession must also be without notice of an available act of insolvency and that taking possession with such notice is not a *bona fide* dealing (*p*). This view, it is submitted, is erroneous. See para. 29 above, "Relation back and protected transactions," and para. 656 (3) below.

We now proceed to consider (1) how possession may be determined by the true owner, and (2) how consent may be revoked.

574. Determination of possession.—If the true owner obtains possession of the goods from the insolvent before the commencement of the insolvency or before the date of the order of adjudication and without notice of the presentation of any insolvency petition by or against the insolvent, the goods do not pass to the Official Assignee. The mode in which possession may be taken differs according to the character of the goods and their situation. Where the goods admit of actual delivery, such delivery must be taken (*q*). Where they do not admit of actual delivery, as where they are lying on the premises of the true owner but in the order and disposition of the insolvent, a symbolical change of possession is sufficient (*r*). Neither actual delivery nor symbolical delivery is necessary if the true owner has determined his *consent* to the reputation of ownership as stated in para. 576 below.

(*n*) *Young v. Hope* (1848) 2 Ex. 105;
Re Wright (1876) 3 Ch. D. 70;
Graham v. Furber (1854) 14 C. B.
410.

(*n1*) *Ex parte Montague* (1876) 1 Ch.
D. 554.

(*n2*) *Re Tillet* (1889) 6 Morr. 70; *Rutter*
v. Everett (1895) 2 Ch. 872;
Re Seaman (1896) 1 Q. B. 412.

(*o*) *Krehl v. Central Goods Co.* (1870)

L. R. 5 Ex. 289.

(*o1*) *Reurwright* (1876) 3 Ch. D. 70.

(*p*) *Mercantile Bank of India v. Official*
Assignee, Madras (1916) 39 Mad.
250, at pp. 259-262, 35 I. C. 942.

(*q*) See *Storer v. Hunter* (1824) 2 B. & C.
368, 384, 107 E. R. 770, 776.

(*r*) *Manton v. Moore* (1790) 7 T. R. 67,
101 E. R. 858.

Para. 574 *Bills of Lading, dock warrants, etc.*—Where goods are at sea indorsement and delivery of a bill of lading constitutes delivery of the goods, a bill of lading being a document of title to the goods (s). In the case of goods at a wharf or in dock, mere indorsement and delivery of a wharfinger's certificate or of a dock warrant is not sufficient to transfer possession; it is necessary that notice should be given to the person in custody of the goods and that he should attorn to the true owner. The reason is that these documents are not documents of title to the goods, but are mere authorities to receive possession (t). Here again it must be remembered that mere notice will suffice and no attornment is necessary if the true owner determines his *consent* to the reputation of ownership in the manner provided by law [para. 576].

Possession taken must be real, but it may be friendly.—As regards possession it is now settled that it need not be hostile. A real possession, even though it be friendly, is sufficient to exclude the operation of the reputed ownership clause. Thus in *Ex parte National Guardian Assurance Co. (u)*, the mortgagee with the intention of assuring his rights under the mortgage deed left a man in possession of household furniture mortgaged to him, such furniture being then within the order and disposition clause. The man remained in the back premises and the mortgagor with the consent of the mortgagee continued to use the furniture as before subject to the control of the man in possession. The mortgagor was afterwards adjudged bankrupt, and the trustee in bankruptcy claimed the furniture. It was held that the possession taken, though friendly, was real, and that the title of the mortgagee prevailed over that of the trustee. James L.J., said: "It is said, however, that the possession taken was not a hostile but a friendly possession. . . . The only question is whether possession was taken by the true owner of the goods with the intention of asserting his rights. In the present case, whatever were the motives of kindness of the [mortgagee] company's manager towards the debtor, it is clear that his object was to get the goods out of the debtor's order and disposition, so as to avoid the effect of his bankruptcy, which was then imminent. He had learnt that the debtor was embarrassed, and he completed his title by taking absolute possession of the goods. It was not a sham but a real possession, taken for the purpose of giving effect to the security of the company." In the same case Thesiger L. J. said: "The debtor had, as in *Vicarino v. Hollingsworth (v)*, the use of the goods but it was subject to the control of the man who was put into possession, and who was there to see that the use was in accordance with the rights of the bill of sale holders."

(s) *Brown v. Heathcote* (1746) 1 Atk. 160, 26 E. R. 103; *Barbar v. Meyerstein* (1869) L. R. 4 H. L. 317, 326, 330.

(t) *Bentall v. Burn* (1824) 3 B. & C. 423, 107 E. R. 791; *Farina v.*

Home (1846) 16 M. & W. 119, 153 E. R. 1124.

(u) (1878) 10 Ch. D. 408; *Vicarino v. Hollingsworth* (1869) 20 L. T. 362.

(v) (1869) 20 L. T. 362.

In *Agabeg's case* (w), the mortgagee of furniture put a *durwan* (watchman) at the gate, and sent a man to make a catalogue with a view to the disposal of the furniture by public auction, but the mortgagor was in the meantime allowed to use the furniture as before until his insolvency. Upon these facts the High Court of Bengal held that the furniture was in the order and disposition of the insolvent, and that it passed to the Official Assignee. This decision, it is submitted, is erroneous. As in *Ex parte National Guardian Insurance Company*, so in this case, the mortgagee took possession with the intention of asserting his rights under the mortgage. The possession was a real and not a sham possession. Though the furniture remained for the time being in the possession of the mortgagor, it was subject to the control of the *durwan*. Such being the case it could not be said that the furniture was in the order and disposition of the insolvent (x).

Right to take possession.—The taking possession is not effective unless the true owner has the right to take possession of the goods. If he has no such right and he takes possession, such possession will not avail him as against the Official Assignee. Thus where goods are assigned by way of mortgage, and the mortgage deed contains a clause enabling the mortgagor to retain possession until default is made in payment, the mortgagee is not entitled to take possession before default is made. On the other hand if the deed contains a further clause empowering the mortgagee to take possession on the happening of a specified event, though it be before default, e.g., the mortgagor becoming embarrassed in his affairs (y), or the mortgagor removing or attempting to remove any part of the goods from the premises without the previous consent of the mortgagee (z), the mortgagee is entitled, on the happening of the contingency, to take possession of the goods.

Taking possession of part of the goods.—The taking possession of part of the goods is tantamount to a withdrawal of consent as to the whole. Thus where goods assigned by way of mortgage are in two shops, and the mortgagee takes possession of goods in one shop, and the mortgagor is afterwards adjudged insolvent, the possession so taken amounts to a withdrawal of the consent of the mortgagee to the goods in the other shop remaining in the mortgagor's order and disposition. The result is that the mortgagee is entitled to possession of goods in both the shops as against the Official Assignee (a).

Taking possession after insolvency.—See para. 573 above.

(w) 2 Ind. Jur. 340.

(x) See *In the matter of R. Brown* (1886)

12 Cal. 629, 637, per Wilson J.

See also *Re Eslick* (1876) 4 Ch.

D. 496, 501, per Bacon C.J.

(y) *Ex parte National Guardian Assurance Co.* (1878) 10 Ch. D. 408; *Ex*

parte Montague (1876) 1 Ch. D. 554, 557.

(z) *Re Eslick* (1877) 4 Ch. D. 406.

See also *Storer v. Hunter* (1824) 3 B. & C. 368, 107 E.R. 770 (lease of coal mine and of chattels).

(a) *Re Eslick* (1877) 4 Ch. D. 496, 502.

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575. Determination of consent.—Just as the true owner may determine the possession of the insolvent by taking possession of the goods, so he may determine his consent to the reputation of ownership. The effect of withdrawing consent is to take the goods out of the order and disposition of the insolvent without any change of possession. We proceed to consider how the consent of the true owner may be withdrawn—

- (i) in the case of goods ;
- (ii) in the case of trade debts.

576. (i) Determination of consent in the case of goods:—

1. *Demand for possession.*—If the true owner *bona fide* demands possession with a view to taking possession, and from no fault of his own he fails to get it, the goods are no longer in the insolvent's possession with the consent of the true owner. The insolvent may after demand refuse to deliver the goods (d), or he may refuse admission to or forcibly eject the true owner or his agent sent to take possession of the goods (e), or sent to catalogue the goods with a view to selling them (f); in all these cases, if there be a *bona fide* demand of possession, the demand itself operates as a withdrawal of the true owner's consent so as to take the goods out of the order and disposition of the insolvent. It seems also that a demand made before the commencement of the insolvency will be effective, even though it may not reach the insolvent until after the commencement of the insolvency (g). In some cases the opinion has been expressed that the mere giving of instructions by the true owner to his agent or his pleader to demand possession may amount to a withdrawal of the true owner's consent (h).

Though no demand is made, yet if the true owner does all that he can to assert his title and take possession of the goods, he puts an end to the reputation of ownership (j). But a mere intention to demand the goods and get possession of them is not sufficient to negative the true owner's consent (k).

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| <p>(b) <i>Smith v. Topping</i> (1833) 5 B. & Ad. 674, 110 E. R. 939.</p> <p>(c) <i>Ex parte Ward</i> (1872) L. R. 8 Ch. App. 144.</p> <p>(d) (1833) 5 B. & Ad. 674, <i>supra</i>; <i>Official Assignee v. Mohamed</i> (1923) 1 Rang. 153, 74 I. C. 919, ('24) A. R. 27; <i>Aburubammal v. Official Assignee of Madras</i> (1924) 47 Mad. 215, 79 I. C. 809, ('24) A. M. 214.</p> <p>(e) <i>Ex parte Montague</i> (1876) 1 Ch. D. 554; <i>Re Ambrose Summers</i> (1896) 23 Cal. 592; <i>Ex parte Harris</i> (1872) L. R. 8 Ch. App. 48.</p> <p>(f) <i>In the matter of R. Brown</i> (1886) 12 Cal. 629, 637-638.</p> | <p>(g) See <i>Ex parte Ward</i> (1872) L. R. 8 Ch. App. 144.</p> <p>(h) <i>Re Eslick</i> (1876) 4 Ch. D. 496; (1924) 47 Mad. 215, 218-219, 79 I. C. 809, ('24) A. M. 214, <i>supra</i>. A letter proved to have been posted to the proper address of a person must be presumed to have reached him in the absence of evidence to the contrary: (1924) 47 Mad. 215, 218-219, 79, I. C. 809, ('24) A. M. 214, <i>supra</i>.</p> <p>(j) <i>Re Eslick</i> (1876) 4 Ch. D. 496, 502; <i>In the matter of R. Brown</i> (1886) 12 Cal. 629, 637-639.</p> <p>(k) <i>Brewin v. Short</i> (1855) L. J. Q. B. 297.</p> |
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2. *Taking possession of part of goods.*—Where goods comprised in the same mortgage are in different places, *e.g.*, where they are in different streets in the same town, taking possession of part of the goods operates as a withdrawal of the true owner's consent as to the whole (*l*).

Goods in possession of warehouseman.—Where goods are not in the actual possession of the insolvent, but of a warehouseman on his behalf, demand of possession from the insolvent is sufficient and notice to the warehouseman is not necessary; for though, in order to take goods out of the possession of the insolvent, notice must be given to the warehouseman, still for the purpose of determining the consent of the true owner, the insolvent is the proper person to receive the notice (*m*).

3. *Goods at sea or abroad.*—In the case of goods at sea (*n*) or in the hands of an agent at a foreign port (*o*), the true owner can determine his consent by giving notice to the agent in possession of the goods; notice if posted before the commencement of the insolvency, will be effective, even though it does not reach the agent until after the insolvency.

4. *Institution of suit.*—Where no demand is made, the institution of a suit to realise the security is tantamount to a withdrawal of consent (*p*).

5. *Granting time after demand.*—The granting of time to the insolvent after demand of possession may (*q*) or may not (*r*) amount to a fresh consent on the part of the true owner to the goods being in the possession, order or disposition of the insolvent; it depends on the circumstances of each case.

6. *Demand of possession after insolvency.*—See para. 573 above.

577. (ii) Determination of consent in the case of trade debts:—

1. *Notice of assignment.*—Where a trade debt is assigned by a trader who afterwards becomes insolvent, the assignee may give notice of the assignment to the insolvent's debtor, and thereby determine his consent to the debt remaining in the order and disposition of the insolvent. Thus if *A* assigns to *B* a trade debt owing to him from *C*, and *B* gives notice of the assignment to *C*, such notice will take the debt out of the order and disposition of *A* (*s*). But if no such

(*l*) *Re Eslick* (1876) 4 Ch. D. 496.

(*m*) *Ex parte Ward* (1872) L. R. 8 Ch. App. 144.

(*n*) *Burn v. Carvalho* (1839) 4 M. & Cr. 690, 40 E. R. 265

(*o*) *Acraman v. Bates* (1860) 29 L. J. Q. B. 78.

(*p*) *Punithavelu Mudaliar v. Bhashyam Ayyangar* (1902) 25 Mad. 406, 418; *Official Assignee v. Mohamed*

(1923) 1 Rang. 153, 74 I. C. 919 ('24) A. R. 27.

(*q*) *Aburubammal v. Official Assignee, Madras* (1924) 47 Mad. 215, 219, 79 I. C. 809, ('24) A. M. 214.

(*r*) *In the matter of R. Brown* (1886) 12 Cal. 629.

(*s*) As to when such notice should be given, see para. 573 above.

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notice is given, the debt will pass to the Official Assignee as part of A's property and be divisible among his creditors (t). Assignment of a debt coupled with notice of the assignment is equivalent to taking possession of the debt by the assignee, and it takes the debt out of the reputed ownership of the insolvent (u). If the notice is posted before the commencement of the insolvency, it will be effective, even though it does not reach the debtor until after insolvency (v). The notice must be an effective notice, that is to say, such a notice as would prevent the person who owes the debt from paying any one but the party giving notice (w). It is not necessary that the assignee should himself have given notice; it is sufficient if the debtor has notice through another source (x). The fact that negotiations were going on between the assignor (insolvent) and the assignee is not a good ground for not giving notice before the commencement of the insolvency (y).

2. *To whom notice should be given.*—The notice should be given to the debtor, that is, the person from whom the insolvent was to have received payment of the debt (z). Where the debtor is a company, the notice should be given to an officer of the company whose duty it is to communicate it to the company (a). Where a receiver of a debt is appointed at the instance of the assignee, the notice may be given by the receiver, but the notice should be given to the debtor. Notice to the assignor (insolvent) is not necessary nor is it sufficient (b).

3. *Bills of exchange.*—No notice of assignment is necessary in the case of a bill of exchange accepted by a debtor to the insolvent, because by accepting the bill the debtor has notice of the assignment. Notice, however, is necessary in the case of an unaccepted bill (c).

4. *Notice of assignment after insolvency.*—See para. 573 above.

578. *True owner's right of proof.*—If the true owner loses his goods by virtue of the reputed ownership clause, he may prove for the value of those goods. If, however, there results a surplus for the insolvent after all his debts are paid and the goods still remain intact, the true owner and not the insolvent, is entitled to the goods. This is because the statute takes the goods away from the true owner, not for all purposes, but for the purposes of the insolvency (d).

- (t) *Re Tillett* (1889) 6 Mor. 70;
Butler v. Everett (1895) 2 Ch. 872;
Bhavan Mulji v. Kavaji Jehangir
(1878) 2 Bom. 542; *Puninthavelu*
Mudaliar v. Bhaskyam Ayyangar
(1902) 25 Mad. 406, 412.
(u) *Re Goetz, Jonas & Co.* (1898) 1
Q. B. 787, 794.
(v) *Belchar v. Bellamy* (1848) 2 Ex. 303,
154, E. R. 508; *Re Dixon* (1900)
83 L. T. 433.
(w) (1902) 25 Mad. 406, 412, *supra*.
(x) *Colonial Bank v. Whinney* (1886)

- 11 App. Cas. 426, 435.
(y) *Re Neal* (1914) 2 K. B. 910. See
also *Re Collins* (1925) Ch. 556,
560.
(z) *Gardner v. Lach Lan* (1838) 4 My.
& Cr. 129, 49 E. R. 51.
(a) *Alleton v. Chichester* (1875) L. R.
10 C.P. 319, 329.
(b) *Re Neal* (1914) 2 K. B. 910.
(c) *Re Goetz, Jonas & Co.* (1898) 1
Q. B. 787, 794.
(d) P.-t. I. A., s. 52 (2) (c), 2nd proviso;
Re Button (1907) 2 K. B. 180.

B. Reputed ownership under Provincial Insolvency Act.

579. Reputed ownership under Provincial Insolvency Act **Para. 579**
 [s. 28 (3)]:—By sec. 28 (3) of the Provincial Insolvency Act it is provided that goods which are, at the date of the presentation of the petition on which the order of adjudication is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof, are divisible amongst his creditors. There are two points of difference between the Presidency-towns Insolvency Act and the Provincial Insolvency Act. The first is as to the rights of secured creditors; the second is as to the goods which fall within the reputed ownership clause.

First, as to the rights of secured creditors. Sec. 28 of the Provincial Insolvency Act consists of seven sub-sections. Sub-sec. (3) relates to reputed ownership. Sub-sec. (6) relates to secured creditors. By sub-sec. (6) it is provided that nothing in sec. 28 shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if sec. 28 had not been passed. Having regard to the order in which these two sub-sections are placed it has been held by the High Courts of Calcutta (e) and Allahabad (f), that the rights of a secured creditor are not affected by the reputed ownership clause, and that the goods, though in the reputed ownership of the insolvent at the time of the insolvency, do not pass to the Receiver. Dealing with this question the High Court of Calcutta observed that though this interpretation of the section was against the spirit and object of the reputed ownership clause, it was impossible to hold otherwise as the clause which saves the rights of secured creditors follows the reputed ownership clause in that section. In the Allahabad case, Walsh, J., said, "We are convinced that inasmuch as the existence of a mortgage over movable property, which remains in the possession of the debtor, would raise all sorts of questions as to the meaning of the terms 'true owner' and 'reputed owner' used in sec. 28, that was why the Legislature went out of its way to enact sub-sec. (6)." I do not think the Legislature did anything of the kind. Though to me the intention of the Indian Legislature in many cases is as inscrutable as the ways of God, it is not so in this case. What happened was that in the Bill as it stood before it was referred to the Select Committee, what is now sub-sec. (6), which saves the rights of secured creditors, stood as a proviso to what is now sub-sec. (2). The Bill as originally drafted did not contain any provision as to reputed ownership or after-acquired property. These were inserted in the section by the Select Committee. While recasting the section the Select Committee placed the clauses relating to reputed

(e) *Shamaldas Khettry v. Phanindra Nath* ('23) A. C. 532, 72 I. C. 467.
 (f) *Motiram v. Rodwell* (1922) 21 All.

L. J. 32, 76 I. C. 749, ('23) A. A. 159.

Para. 579 ownership and after-acquired property immediately after what is now sub-sec. (2), and detached from that sub-section the proviso relating to the rights of secured creditors, and placed it where it now stands. Nobody seems to have considered what the effect of that change would be. It was not as if the Select Committee deliberately placed the clause relating to the rights of secured creditors after the reputed ownership clause. By far the largest number of transactions to which the doctrine of reputed ownership applies are mortgages of goods. The section as it stands does not apply to such transactions. The operation of the clause is confined to cases where the true owner has lent his goods for use to the insolvent, or let them out on hire to him, or sent them to his shop for sale, or having bought the goods from the insolvent has allowed the insolvent to continue in possession thereof, and such other cases. Cases, however, of this kind are very rare in the mufassal. The result is that the reputed ownership clause has almost become a dead letter in the mufassal. But I for one do not regret this result. The doctrine of reputed ownership has operated very harshly in several cases, and it has worked greater evil than good. It is not recognized in several systems of Bankruptcy Law. If, however, that clause is to stand in the Statute Book of India as a living clause, the whole section should be recast. The section as it now stands is like a Cheap Jack's shop packed with varieties of clothes some of which are for mere show.

Further, the section of the Presidency-towns Insolvency Act contains a proviso whereby it is enacted in effect that choses in action other than trade debts are not goods within the meaning of the section [para. 548]. There is no such provision in the Provincial Insolvency Act. Are choses in action other than trade debts to be regarded as goods within the meaning of sec. 28 (3) of the Provincial Insolvency Act? We do not think that that was the intention. This, however, is another instance of an attempt to shorten the Act without regard to precision.

The second point of difference is as to the point of time when the reputed ownership clause takes effect. Under sec. 55 (2) (c) the Presidency-towns Insolvency Act goods affected by the reputed ownership clause must be in the possession, order or disposition of the insolvent *at the commencement of the insolvency* (para. 582). Under sec. 28 (3) the Provincial Insolvency Act they must be in his possession, order or disposition *at the date of the presentation of the petition on which the order of adjudication is made*. The true owner may take the goods out of the order and disposition of the insolvent at any time before the presentation of the petition. He may do so even after the presentation of the petition, provided it is done before the date of the order of adjudication and without notice of the presentation of the petition. The mode in which the true owner may determine possession and revoke his consent is discussed in para. 573 above.

The result is that except as to (1) secured creditors [paras. 551, 562] and (2) the commencement of the insolvency, there is no substantial difference between the provisions of the two Acts.

LECTURE X.

PART I.

DOCTRINE OF RELATION BACK.

P.-t. I. A., s. 51 ; Prov. I. A., 1920, s. 28 (7).

580. Meaning of "relation back."—It may appear at first sight that the title of the Official Assignee or Receiver commences from the date of the order of adjudication, as that is the date on which the property of the insolvent vests in the Official Assignee or Receiver, but it is not so. Under the Provincial Insolvency Act, sec. 28 (7), the title of the Receiver commences at the date of the presentation of the petition on which the order of adjudication is made. Under the Presidency-towns Insolvency Act, sec. 51, the title of the Official Assignee commences at a much earlier date, and that is the time when the debtor committed the earliest act of insolvency which he is proved to have committed within three months before the presentation of the petition on which the order of adjudication is made. Such an act of insolvency is described in the English law as "the first available act of insolvency" (a). The principle now under consideration is called the doctrine of relation back. The title of the Official Assignee *relates back to* and commences at the time of the first available act of insolvency committed within three months before the presentation of the insolvency petition. The title of the Receiver *relates back to* and commences at the date of the presentation of the insolvency petition. It is not uncommon for debtors on the eve of insolvency to transfer their property to others to defraud their creditors. Justice to the creditors requires that such transfers should not be allowed to stand, and it is for this purpose that the title of the Official Assignee and Receiver is made to relate back to a date earlier than the date of the order of adjudication. The Official Assignee or Receiver is deemed to be the owner of the property, under the Presidency-towns Insolvency Act, from the moment the first available act of insolvency is committed, and under the Provincial Insolvency Act, from the date of the presentation of the insolvency petition. As such owner he is entitled to impeach all dealings and transactions entered into by the insolvent even prior to the date of adjudication. At the same time provision is made for the protection of *bona fide* transactions entered into before the date of adjudication by sec. 57 of the Presidency-towns Insolvency Act and the corresponding sec. 55 of the Provincial Insolvency Act. These sections are called protection sections and they are dealt with in Part VI of this Lecture.

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581. History of the doctrine of relation back.—Relation back of the title of the trustee in bankruptcy has existed under English Statute

(a) B. A., 1914, s. 167.

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law since 13 Eliz., c. 7. Under that statute the formal bankruptcy might take place at any time subsequent to an act of bankruptcy and the title of the trustee dated back to the date of the act of bankruptcy, however remote that date might be, so that during the whole of the rest of the man's life there would be the possibility of setting aside any dealings by him in relation to property which then belonged to him. The effect of subsequent legislation in England has been to limit this relation back from time to time. Under the Act of 1869 an act of bankruptcy was available for adjudication for six months, and the title of the trustee in bankruptcy related to prior acts of bankruptcy committed within twelve months before adjudication (*b*). Under the Act of 1883, an act of bankruptcy was available for adjudication for three months, and the title of the trustee related back to the earliest act of bankruptcy proved to have been committed within three months before the presentation of the petition on which the receiving order was made (*c*). This is also the law under the Bankruptcy Act, 1914 (*d*), and under the Presidency-towns Insolvency Act. The maximum period of relation back is now three months, so that if the requisite bankruptcy proceedings are not taken within that period, the act of bankruptcy ceases to be effective, and there can be no relation back to the date of that act of bankruptcy even though bankruptcy should subsequently supervene.

582. Commencement of insolvency.—Property which belongs to the insolvent at the commencement of the insolvency vests in the Official Assignee or Receiver. The Official Assignee or Receiver becomes the owner of the property, not merely from the date when the order of adjudication is made, but from the commencement of the insolvency (*e*).

Under the Presidency-towns Insolvency Act, the insolvency is deemed to have relation back to and to commence at the time when the act of insolvency is committed on which the order of adjudication is made. If the insolvent has committed more acts of insolvency than one, the insolvency commences at the time of the first of the acts of insolvency proved to have been committed by the insolvent within three calendar months next preceding the date of the presentation of the insolvency petition. The time of the commencement of the insolvency is the actual *moment* of the day when the act of insolvency was committed, and not the beginning of that day (*f*). If the act of insolvency is the act of the insolvent himself, *e.g.*, a transfer of property to defeat or delay creditors, the title of the Official Assignee or Receiver relates back to the *moment of the commencement* of the act of insolvency, but if it is not a voluntary act, but a proceeding *in invitum*, *e.g.*, a sale of property under an execution, the title relates back to the *completion* of the transaction which constitutes the act of

(b) B.A., 1869, ss. 6, 11.

(c) B.A., 1883, ss. 6, 43.

(d) B.A., 1914, ss. 4, 37.

(e) P.-t. I. A., s. 52 (1) (a); Prov. I. A., s. 28 (2) & (7).

(f) *Re Bumpus* (1908) 2 K.B. 330.

insolvency (g). The law as to commencement of insolvency under the Presidency-towns Insolvency Act is the same as the English law. Para. 582

Under the Provincial Insolvency Act, an order of adjudication relates back only to the date of the presentation of the petition on which it is made; in other words, the insolvency commences with the presentation of the petition.

Under both the Acts the title of the Official Assignee or Receiver relates back to the *commencement of the insolvency*. The only difference is as to the point of time when the insolvency commences. This may be explained by two hypothetical cases, one of adjudication on a creditor's petition, and the other of adjudication on the debtor's own petition.

(i) Adjudication on creditor's petition :—

- (1) 1st January 1929—*first act of insolvency*, being a transfer by way of fraudulent preference (h).
- (2) 1st February 1929—*second act of insolvency*, being a transfer with intent to defeat creditors (i).
- (3) 1st March 1929—*third act of insolvency*, being departure of debtor from his usual place of business with intent to defeat his creditors (j).
- (4) 25th April 1929—presentation of creditor's petition for adjudication founded on the *third act of insolvency*.
- (5) 25th May 1929—order of adjudication.

Under the Presidency-towns Insolvency Act, the insolvency commences from 1st February 1929 when the second act of insolvency was committed, that being the date of the *earliest act of insolvency* committed within three months before the date of the presentation of the petition, and the title of the Official Assignee relates back to that date. The first act of insolvency does not count, for it was committed on 1st January 1929, that is, more than three months before the date of the presentation of the petition and it is not available for any purpose under the bankruptcy law. If the debtor had committed only the third act of insolvency, the insolvency would have commenced on 1st March 1929, and the title of the Official Assignee would have related back to that date. The same is the rule of the English law.

Under the Provincial Insolvency Act, the insolvency commences on 25th April 1929, that being the date of the presentation of the petition, and the title of the Receiver relates back to that date.

(g) *Ex parte Villars* (1874) L.R. 9 Ch. App. 432, 445.

(h) P.-t. I. A., s. 9 (c); Prov. I. A., s. 6 (c).

(i) P.-t. I. A., s. 9 (b); Prov. I. A., s. 6 (b).

(j) P.-t. I. A., s. 9 (d) (ii); Prov. I. A., s. 6 (d) (ii).

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(ii) Adjudication on debtor's petition :—

- (1) 1st January 1929—notice of suspension of payment by insolvent (*k*).
- (2) 1st February 1929—presentation of petition by debtor to be adjudged insolvent.
- (3) 1st March 1929—order of adjudication.

It should be remembered that the presentation of a petition by a debtor to be adjudged insolvent is in itself an act of insolvency (*l*).

Here there are two acts of insolvency, namely, (1) the giving of the notice of suspension of payment, and (2) the presentation by the debtor of the petition. Under the Presidency-towns Insolvency Act, the insolvency commences on 1st January 1929, that being the date of the first act of insolvency committed within three months before the date of the presentation of the petition and the title of the Official Assignee relates back to that date. If the presentation of the petition was the only act of insolvency committed by the debtor, the insolvency would have commenced on 1st February 1929, and the title of the Official Assignee would have related back to that date. The same is the rule of the English law.

Under the Provincial Insolvency Act, the insolvency commences on 1st February 1929, that being the date of the presentation of the petition, and the title of the Receiver relates back to that date.

Summarizing the above, we may say that the commencement of an insolvency under the Presidency-towns Insolvency Act is from the *moment* when the debtor committed the earliest act of insolvency which he is proved to have committed within three months before the presentation by the debtor or a creditor of the petition on which the order of adjudication is made. Under the Provincial Insolvency Act, the commencement of the insolvency is invariably the date of the presentation of the petition by or against the debtor on which the order of adjudication is made. Whatever may be the date of the commencement of the insolvency, there must always be an interval between the commencement of the insolvency and the date of the order of adjudication.

The following points may now be noted :—

- (1) Until an order of adjudication is made there is no insolvency, and the debtor retains the property.
- (2) No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property and only upon such an order being made can any

(*k*) P.-t. I. A., s. 9 (g); Prov. I. A., s. 6 (g). | (*l*) P.-t. I. A., s. 9 (f); Prov. I. A. s. 6 (f).

vesting take place at all ; but once the order is made, the effect created by it is by a legal fiction taken to relate back to the commencement of the insolvency which is always some anterior date (*m*).

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- (3) On adjudication the property vests in the Official Assignee or Receiver, and his title relates back to the point of time when the insolvency commences. The insolvent not only ceases to be the owner, but is regarded as not having been the owner between the commencement of the insolvency and the date of the order of adjudication.

583. Transactions impeachable under bankruptcy law.—On the making of an order of adjudication the title of the Official Assignee or Receiver relates back to the commencement of the insolvency. From this it follows that all dealings and transactions by the insolvent in respect of his property between the commencement of the insolvency and the date of the order of adjudication are impeachable by the Official Assignee or Receiver. To this, however, there is an exception being that contained in sec. 57 of the Presidency-towns Insolvency Act and the corresponding sec. 55 of the Provincial Insolvency Act. Those sections protect certain transactions entered into before the date of the order of adjudication if they are entered into *bona fide* and without notice of the presentation of an insolvency petition.

584. Transactions not impeachable under bankruptcy law.—With the exception of voluntary transfers which may be impeached under sec. 55 of the Presidency-towns Insolvency Act, no disposition of his property by a debtor, in cases governed by that Act, can be impeached under the *bankruptcy law*, if the disposition took place more than three months before the presentation of the petition on which the order of adjudication is made, or if it took place before the first act of insolvency committed within those three months (*n*). Thus a transfer for the benefit of the general body of creditors [sec. 9 (a)], or a transfer with intent to defeat or delay creditors (o) [sec. 9 (b)], or a transfer by way of fraudulent preference (p) [sec. 9 (c)], cannot be impeached *under the bankruptcy law*, if it took place more than three months before the presentation of the petition on which the order of adjudication is made.

The law under the Provincial Insolvency Act is different. Under that Act, with the exception of (1) certain voluntary transfers which are impeachable under sec. 53 of the Act, and (2) certain transfers by way of fraudulent

(*m*) *Sheonath Singh v. Munshi Ram* (1920) 42 All. 433, 55 I.C. 941.

(*n*) P.-t. I. A., s. 51 (1).

(*o*) *Allen v. Bennett* (1870) L.R. 5 Ch. App. 577.

(*p*) *Ex parte Games* (1879) 12 Ch.D. 314 ;
Re Harvey (1890) 7 Morr. 138.
See also *Re Beeson* (1899) 1 Q.B. 626.

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preference which are impeachable under sec. 54 of the Act, no disposition of his property by a debtor can be impeached under the *bankruptcy law*, if it took place before the date of the presentation of the petition on which the order of adjudication is made (g). Thus a transfer for the benefit of the general body of creditors [sec. 6 (a)], or a transfer with intent to defeat or delay creditors [sec. 6 (b)], cannot be impeached *under the bankruptcy law* if it was made before the date of the presentation of the petition on which a debtor is adjudged insolvent.

A transfer, though it may not be impeachable under the bankruptcy law, may be impeachable under the general law. Thus a transfer with intent to defeat creditors may, besides being an act of insolvency, be fraudulent within the meaning of sec. 53 of the Transfer of Property Act, 1882. In such a case the transfer may be impeached by the Official Assignee or Receiver as representing the creditors of the insolvent under that section, though it was made long before the commencement of the insolvency, provided he does so within the period of limitation (r). A transaction may similarly be impeached by him if it is void as a specific attempt to evade the operation of the bankruptcy law. Thus a stipulation in a deed that, upon a man becoming insolvent, that which was his property up to the date of the insolvency should go over to some one else and be taken away from his creditors, is void as being a violation of the policy of bankruptcy law, and the Official Assignee or Receiver is entitled to such property, though the deed was executed long before the commencement of the insolvency (s). See para. 138 (8) above.

585. General results of the doctrine of relation back.—A debtor cannot after the commencement of his insolvency enter into any transaction in respect of his property which will bind the Official Assignee or Receiver, and a person dealing with him from that date may find himself in a precarious position. If he pays money to the debtor he gets no discharge for it and may have to pay again to the Official Assignee or Receiver; if he receives money from the debtor, he is liable to return it; if he buys property he gets no title as against the Official Assignee or Receiver, unless in each of these cases the transaction comes within the protection section (t).

(g) Prov. I. A., s. 28 (7).

(r) *Re Maddever* (1884) 27 Ch. D. 523 [limitation].

(s) *Ex parte Jay* (1879) 14 Ch.D. 19 [landowner and builder]; *Ex parte Jackson* (1880) 14 Ch.D. 725 [attornment clause in mortgage deed—rent unreal]; *Ex parte Barter* (1884) 26 Ch.D. 510 [shipbuilding contract]; *Ex parte Furber* (1877) 6 Ch D 181 [liquidation by

arrangement]; *Farmers' Mart, Ltd. v. Milne* (1915) A.C. 106 [contract of employment]. See the Indian Contract Act, 1872, s. 23, and the Transfer of Property Act, 1882, s. 13.

(t) *Ponsford-Baker & Co. v. Union of London and Smith's Bank, Ltd.* (1906) 2 Ch. 444, 452, per Fletcher Moulton, L.J.

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586. Payments by insolvent.—If money belonging to the insolvent has been paid by the insolvent or by an agent on his behalf, between the commencement of the insolvency and the date of the order of adjudication, it may be recovered by the Official Assignee or Receiver from the person who has received it or from the agent unless the payment comes within the protection section (u). This does not apply to payments by persons who act merely as messengers to pay over the money (v). The relation back of title empowers the Official Assignee or Receiver to recover money, which the principle *in pari delicto potior est conditio possidentis* would have prevented the insolvent himself from recovering. Thus if money belonging to the insolvent is paid away by a third party to stifle a prosecution, it may be recovered from the payee though he was ignorant when he received it that it was the insolvent's money. The consideration being illegal, the protection section does not apply (w). See para. 658 below.

587. Transfer of property by insolvent.—If property belonging to the insolvent is disposed of by him or by an agent on his behalf between the commencement of the insolvency and the date of the order of adjudication, then if the transaction is not within the protection section, the property may be recovered back by the Official Assignee or Receiver, or the person who made the disposition may be made liable to the Official Assignee or Receiver for the value of the property (x). See paras. 659 and 661 below.

588. Payments to insolvent.—If money due to the insolvent is paid to him or his agent between the commencement of the insolvency and the date of the order of adjudication, the debtor may be compelled to pay it again to the Official Assignee or Receiver, or the sum may be recovered from the agent, unless the transaction is within the protection section (y). See para. 660 above.

589. Trustees under a void deed of transfer.—When a debtor transfers his property to trustees for the benefit of his creditors (which is an act of insolvency), and the trustees take possession of the property and carry on his business under the provisions of the deed, and the debtor is subsequently adjudged an insolvent on the act of insolvency committed by the execution of the deed, the title of the Official Assignee or Receiver relates back to the date of the transfer, and the Official Assignee or Receiver must elect to treat the trustees either as trespassers or as his agents. If he elects to treat them

(u) *Ex parte Edwards* (1884) 13 Q.B.D. 747; *Re Simonson* (1894) 1 Q.B. 433. See also *Ex parte Helder* (1883) 24 Ch. D. 339.
(v) *Cole v. F. Wright* (1811) 4 Taunt. 198, 128 E.R. 305.
(w) *Ex parte Wolverhampton Banking Co.* (1884) 14 Q.B.D. 32.

(x) *Vernon v. Hankey* (1787) 2 T.R. 113, 100 E.R. 62.
(y) *McEntire v. Potter & Co.* (1889) 22 Q.B.D. 438, a case of money paid by a marine insurance company to a bankrupt after adjudication.

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as trespassers, they must deliver up to him all the property of the insolvent of which they took possession and which remains in their possession unconverted, and must pay him the value of any property which they have converted (z). If the trustees have paid out of the property any sum to their solicitor for costs incurred in relation to the deed, the trustees are liable to repay that sum to the Official Assignee or Receiver (a). If a debtor of the insolvent pays his debt to the trustees, then, if the transaction is not within the protection section, the debt is not discharged, and the debtor may be compelled to pay it again to the Official Assignee or Receiver, unless it can be shown that the trustees have paid the money to the Official Assignee or Receiver (b). Where trustees under a creditors' deed took possession of the debtor's stock in trade, and subsequently allowed the debtor to have it back, with the consent of the majority of the creditors on a composition being secured, and the debtor sold the stock in trade and disposed of the proceeds, it was held that the trustees had intermeddled with the estate and must account for the stock in trade and pay its value to the trustee in bankruptcy (c).

590. Sham companies.—If the insolvent sells and transfers his business to a company formed by him for that purpose, and the transfer is set aside as fraudulent and an act of insolvency, the title of the Official Assignee relates back to the date of the transfer, and prevails over that of the creditors of the company (d). If the business of such a company has meanwhile been carried on by a receiver for the debenture-holders, the receiver is liable as a trespasser to account to the Official Assignee for the assets, if any, which may have come into his hands, or for the value thereof (e). The same principles, it seems, would apply to cases under the Provincial Insolvency Act.

591. Sub-sec. (2): Act of insolvency anterior to petitioning creditor's debt.—Under the English law as it stood before 46 Geo. 3, c. 135, a commission of bankruptcy was liable to be avoided by the existence of a prior act of bankruptcy and a sufficient debt whereon a new commission might be sued out. By sec. 5 of that Statute it was provided that no commission of bankruptcy should be avoided by reason of any act of bankruptcy having been committed before the debt due to the petitioning creditor was contracted, if the petitioning creditor had not notice of any such act of bankruptcy at the time when the debt to him was contracted. By sec. 88 of the Bankruptcy Act, 1849, it was provided that no adjudication should be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there was a sufficient act of bankruptcy subsequent to such debt. Sec. 43 of the Bankruptcy Act, 1883, on which the section in both the Indian Acts is based, expressly saves the petition and the receiving order as well as the adjudication. The provisions of sec. 43 of the Act of 1883 are re-enacted in sec. 37 of the Bankruptcy Act, 1914.

(z) *Ex parte Vaughan* (1884) 14 Q.B.D. 25.

(a) *Re Forster* (1887) 4 Morr. 292. By s. 21 of the Deeds of Arrangement Act, 1914, a trustee under a deed avoided by bankruptcy is entitled

to expenses properly incurred.

(b) *Davis v. Patrie* (1906) 2 K.B. 786.

(c) *Re Prigoshen* (1912) 2 K.B. 494.

(d) *Re Hirth* (1899) 1 Q.B. 612.

(e) *Re Goldburg* (No. 2), (1912) 1 K.B. 606.

LECTURE X.

PART II.

RESTRICTION OF RIGHTS OF EXECUTION CREDITORS.

[P.-t. I A., s. 53 ; Prov. I A., s. 51.]

592. Rights of creditors under execution.—Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Official Assignee or Receiver except in respect of assets realised in the course of the execution by sale or otherwise, under the Presidency-towns Insolvency Act, before the date of the order of adjudication and before he had notice of the presentation of an insolvency petition, and under the Provincial Insolvency Act, before the date of the admission of the petition.

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593. The dividing line.—To entitle an execution creditor to the benefit of the execution it is necessary that the assets should have been realised in the course of execution before a particular date. Under the Presidency-towns Insolvency Act the assets must have been realised before *the date of the order of adjudication (f)* and before the execution creditor had notice of the presentation of an insolvency petition by or against the debtor. Under sec. 34 of the Provincial Insolvency Act, 1907, the dividing line was the same, namely, the date of the order of adjudication, but there was no provision that the assets must have been realised before the execution creditor had notice of the presentation of a petition. The result was that a creditor who had obtained a decree against a debtor was entitled to proceed with the execution of his decree and to have the debtor's property sold even after the presentation of an insolvency petition by or against him and even after he had notice of such presentation, and if the sale proceeds were realised before the making of the order of adjudication, he was entitled to receive the entire sale proceeds (g). To remedy this evil, the section was amended and the dividing line is now fixed by sec. 51 of the Provincial Insolvency Act, 1920, at the date of the admission of the insolvency petition. The result is that an execution creditor under that Act is not entitled to the benefit of the execution unless the assets are realised before the admission of the petition.

The benefit of the execution to which the individual execution creditor would otherwise be entitled is lost if the assets have not been realised in the

(f) An adjudication order is made on the day it is pronounced and not on the day when it is signed and sealed: *Blount v. Whitely* (1899) 79 L. T. 635, (1899) 6 Mans. 48; *In the matter of John Bodry* (1870) 5 Beng. L. R. 309.

(g) See *Sri Chand v. Murani Lal* (1912) 34 All. 628, 16 I.C. 183; *Din Dayal v. Gur Saran Lal* (1920) 42 All. 336, 59 I.C. 67; *Madhu Sardar v. Khitish Chandra* (1915) 42 Cal. 289, 30 I.C. 82.

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course of execution before the respective dates mentioned above. Accordingly, if the assets are not realised before those dates, the property seized under the execution will pass to the Official Assignee or Receiver for the benefit of the general body of creditors (h). The question which always arises in cases of this nature is whether the particular creditor is entitled to his money in full, while the general body of creditors get only their dividend out of the estate, and the test is whether the assets claimed by the individual creditor were realised in the course of execution before the respective dates mentioned above (i). A typical case is where immovable property is sold in execution and the purchaser pays 25 per cent. on the amount of the purchase-money to the sheriff, and the judgment-debtor becomes insolvent before the due date for the payment of the balance. The assets (purchase-money) cannot in such a case be deemed to have been realised before the respective dates mentioned above (j), and the sheriff must pay to the Official Assignee or Receiver the deposit received by him. The execution creditor is not entitled to the amount, and it will be held by the Official Assignee or Receiver for the benefit of the general body of creditors including the execution creditor. If the judgment-debtor becomes insolvent after the whole of the purchase-money is paid, the execution creditor, and not the Official Assignee or Receiver, is entitled to it, though the sale may not be confirmed until after the insolvency (k).

594. English law.—It is necessary at this stage to sound a note of warning against applying English decisions as to the rights of execution creditors to cases arising in India. The English law as to the rights of execution creditors is different from the Indian law. Under the English law an execution against the goods or land of a debtor, or an attachment of debts due to him, will not be good against the trustee in bankruptcy, unless *completed* by the creditor before the date of the receiving order and before notice of a bankruptcy petition or of an available act of bankruptcy. An execution against goods is completed for this purpose by seizure and sale; an attachment of a debt is completed by receipt of the debt; an execution against land is completed by seizure or, in the case of an equitable interest in land, by the appointment of a receiver (l). The question under the English law in each case is whether the execution was *completed* before the material date. Under the Indian law, the question to be determined is whether the *assets were realised in the course of execution by sale or otherwise* before the material date. These questions are entirely distinct and consequently decisions under the English law afford no guide to the determination of questions arising under the Indian law.

(h) *Re Dickinson* (1888) 22 Q.B.D. 187.

(i) *Re Ford* (1900) 1 Q. B. 264, 268.

(j) *Hafez v. Damodar* (1891) 18 Cal. 242.

(k) See *Vishvanath v. Virchand* (1882) 6 Bom. 16.

(l) B. A., 1883, s. 45; B.A., 1914, s. 40.

Further, under the English law the execution must have been completed not only before notice of the presentation of a petition, but also before notice of an available act of insolvency. The execution, therefore, must have been completed before the sheriff has been in possession for twenty-one days; otherwise the execution will be avoided by the act of bankruptcy which is deemed to be committed at the expiration of twenty-one days, and of which the execution-creditor will be deemed to have notice (11). Under the Indian law notice of an available act of insolvency is immaterial.

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595. Attachment.—An attachment, whether before or after judgment, does not create any charge on the attached property. An attaching creditor, therefore, is not a secured creditor within the meaning of sub-sec. (2). Hence if an order of adjudication is made after attachment, but before sale, the property vests in the Official Assignee or Receiver for the benefit of the general body of creditors, and the attaching creditor is not entitled to obtain satisfaction of his decree by sale of the attached property. The order of adjudication divests the rights of the attaching creditor and remits him to the position of an ordinary creditor (*m*). *A* obtains a decree against *B*, and attaches *B*'s property in execution. *C* claims the property as his own, and the executing Court upholds his claim and releases the property from attachment. *A* files a suit against *B* and *C* under O. 21, r. 63, of the Code of Civil Procedure, 1908, for a declaration that the property belongs to *B*, and obtains a decree. *C* appeals from the decree to the High Court. The appeal is dismissed, with the result that the attachment is revived. *A* is nevertheless an unsecured creditor and if *B* is adjudged insolvent before the property could be sold in execution of *A*'s decree, *A* is entitled only to a rateable distribution of the assets (*m1*).

596. Realisation of assets.—An execution against the property of a debtor is not good against the Official Assignee or Receiver except in respect of "assets realized in the course of the execution by sale or otherwise". The words "assets realized in the course of the execution by sale or otherwise" have been taken from sec. 295 of the Code of Civil Procedure, 1882, which provides for rateable distribution of "assets realized by sale or otherwise in execution of a decree" among the holders of decrees for money against the same judgment-debtor. The words used in sec. 295 gave rise to a considerable conflict of opinion, and they have been replaced in the corresponding section 73 of the Code

(11) *Figg v. Moore* (1894) 2 Q.B. 690; *Burns-Burns' Trustee v. Brown* (1895) 1 Q. B. 324.

(*m*) *Raghunath Das v. Sundar Das* (1915) 42 Cal. 72, 41 I.A. 251, 24 I.C. 304; *Frederick Peacock v. Madan Gopal* (1902) 29 Cal. 428; *Charles Agnew Turner v. Pestonji* (1896)

20 Bom. 403; *Kashi Nath v. Kanhaiya Lal* (1915) 37 All. 452, 29 I.C. 990; *Krisnaswamy Mudaliar v. Official Assignee of Madras* (1903) 26 Mad. 673.
(*m1*) *Harachandra v. Jay Chand* (1930) 57 Cal. 122, ('29) A. C. 524.

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of Civil Procedure, 1908, by the words "assets held by a Court." It is not necessary to set out here the vast mass of decisions bearing on the words "assets realized by sale or otherwise in execution of a decree" in sec. 295 of the Code of 1882. They will be found in the notes to sec. 73 in any commentary on the Code of Civil Procedure. We proceed to note some of the important decisions.

597. Garnishee notice.—*A* obtains a decree against *B* for Rs. 1,000, *C* owes Rs. 1,500 to *B*. In execution of his decree *A* attaches the debt due by *C* to *B* and a garnishee notice is issued. The notice is served on *C* and he pays Rs. 1,500 to the sheriff. Before the amount is paid over to *A*, *B* is adjudged insolvent, and his property vests in the Official Assignee. Upon these facts it was held in a case under the Indian Insolvency Act, 1848, that the Official Assignee, and not *A*, was entitled to the money (*n*). The case was decided under the English law. Under that law an attachment of a debt is not complete until it is actually received by the execution creditor. Under the present section, immediately the money was paid by *C* to the sheriff, it would be an asset realised in the course of execution, and *A* would be entitled to it in preference to the Official Assignee.

598. Order for rateable distribution.—Where property belonging to a judgment-debtor is attached on the application of a decree-holder, and other persons holding money decrees against him have applied for execution, and the property is subsequently sold and the proceeds are realized, and an order for rateable distribution is made under sec. 73 of the Code of Civil Procedure, 1908, and the judgment-debtor afterwards becomes insolvent, the persons entitled to the sale-proceeds are the execution creditor and the other decree-holders included in the order. From the time the order for rateable distribution is made, the money belongs to them. The Official Assignee or Receiver is not entitled to any part thereof (*o*).

599. Receiver of mortgaged property.—Where after the passing of a decree in a mortgage suit for a sale of the mortgaged property, a receiver is appointed by consent of the parties to recover the rents of the property for a period of one year and to hand them over to the plaintiff-mortgagee, the latter alone is entitled to them. The insolvency of the mortgagor at any time during the period of one year does not affect the plaintiff's rights. The Official Assignee is not entitled to them, nor are other decree-holders, if any, entitled to a rateable distribution thereof (*p*).

(*n*) *Jilmand v. Ramchand* (1905) 29 Bom. 405.

(*o*) *Official Receiver v. Venkatarama Iyer* (1922) 42 Mad. L.J. 361, 68 I. C. 512, ('22) A.M. 31; *Howatson v. Durrant* (1900) 27 Cal. 351.

(*p*) *Jhunku Lal v. Piari Lal* (1917) 39 All. 204, 38 I. C. 613 *Re Moolji Morarji* ('20) A. S. 114, 115 I. C. 306; See also *Re Pearce* (1919) 1 K. B. 354, 363, 364.

600. Secured creditors [sub-sec. (2)].—The restrictions imposed by the section under consideration on the rights of creditors under execution do not affect the right of a secured creditor in respect of property against which a decree is executed. Thus a mortgagee who has obtained a decree for sale of the mortgaged property is entitled to have the property sold in execution of his decree even after an order of adjudication is made against the mortgagor (*q*). See paras. 259 and 599.

601. Money in Court and secured creditors.—It has been held in England that where in an action on a bill of exchange money is deposited in Court by the defendant to abide the event, and the matter is submitted to arbitration, and before the award the defendant becomes bankrupt, and an award is subsequently made in favour of the plaintiff, the plaintiff is to be treated as a secured creditor in respect of the deposit (*r*). In that case Sir W. M. James, L. J., said that the effect of the order was that “the money which was paid into Court belonged to the party who might be eventually found entitled to the sum.” It has similarly been held that where money is paid into Court admitting liability, the plaintiff in the event of the defendant’s bankruptcy is a secured creditor in respect of it, and when liability is denied, he is a secured creditor for so much of his claim in the action as may be admitted for proof in bankruptcy (*s*). The same principle has been held to apply to money paid into Court as a condition of leave to defend under the Rules of the Supreme Court, 1883, O. 14, and such money will be ordered to remain in Court until the event is determined either by trial of action or admission of a proof (*t*). The principle of these decisions has been applied to cases arising in India. We proceed to note the Indian cases.

Where a defendant has been arrested before judgment, and is released from custody on paying into Court, under O. 38, r. 2, of the Code of Civil Procedure, 1908, a sum of money sufficient to meet the plaintiff’s claim in the suit, and he is afterwards adjudged insolvent, the plaintiff is a secured creditor to the extent of the amount for which judgment may be passed for him and he is entitled to payment in priority to the Official Assignee. But it is otherwise if the defendant pays money into Court as a security for his appearance at any time when called upon while the suit is pending (*u*). Where money is paid into Court by the defendant under O. 38, r. 5, of the Code, the plaintiff acquires no charge on the money, and it passes to the Official Assignee on his insolvency. The reason is that the money in such

(*q*) *Lang v. Heptullabhai* (1914) 38 Bom. 359, 21 I.C. 714; *Ishwar v. Harjivan* (1897) 21 Bom. 681; *Official Receiver v. Palaniswami Chetti* (1925) 48 Mad. 750, 88 I.C. 934, (‘25) A.M. 1051.
(*r*) *Ex parte Banner* (1874) L.R. 9 Ch.

App. 379. See also *Ex parte Bouchard* (1879) 12 Ch. D. 26.
(*s*) *Re Gordon* (1897) 2 Q.B. 516.
(*t*) *Re Ford* (1900) 2 Q.B. 211.
(*u*) *Ramiah Aiyar* (1918) 41 Mad. 1053, 49 I.C. 20.

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a case is deposited as a security to produce and place at the disposal of the Court property which the defendant was about to dispose of or remove from the jurisdiction of the Court (v). The same rule applies where property is attached before judgment and it is released by the defendant on paying money into Court (w). If a stay of execution is granted by the Appellate Court under O. 41, r. 5 of the Code, on the appellant depositing in Court to the credit of the suit the decretal amount, and the appellant becomes insolvent before the hearing of the appeal, and the appeal is subsequently dismissed, the amount so deposited is payable to the decree-holder and not to the Official Assignee (x). Money deposited in Court as security under an order made under O. 9, r. 13, of the Code of Civil Procedure, 1908, by which an *ex parte* decree is set aside and the suit restored, has been held to stand on the same footing as money paid in to abide the event, and is security to the plaintiff for the sum for which he may ultimately obtain a decree. The insolvency of the defendant does not affect the plaintiff's right to draw out the sum from Court if a decree is eventually passed in his favour (y). Similarly money paid into Court by the defendant as a condition of being allowed to defend a summary suit under O. 37, r. 3 of the Code, is a security to the plaintiff for the amount for which judgment may be passed for him (y1). And so is money paid into Court by the defendant under O. 24, r. 1, of the Code (y2).

602. Execution-purchaser buying in good faith [sub-sec. (3)].— It is provided by sec. 53 (3) of the Presidency-towns Insolvency Act and the corresponding sec. 51 (3) of the Provincial Insolvency Act that a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Official Assignee or Receiver. This subject is discussed fully in paragraph 255 above.

(v) *Errikulappa v. The Official Assignee, Madras* (1916) 39 Mad. 903, 32 I.C. 190.

(w) *Promatha Nath v. Mahini Mohan* (1915) 19 C.W.N. 1200, 31 I.C. 573.

(x) *Chowthmull v. Calcutta Wheat and Seeds Association* (1924) 51 Cal.

1010, 84 I.C. 922, ('25) A.C. 416.

(y) *Parasotam Das v. David* (1915) 13 All. L.J. 893, 30 I.C. 779.

(y1) *Gopalaiyar v. Thiruvengadam* (1917) 32 Mad. L.J. 503.

(y2) *Maganlal Parbhuram v. N. A. Aziz Haji Karim* (1927) 5 Rang. 753.

LECTURE X.

PART III.

PROPERTY TAKEN IN EXECUTION.

[P.-t. I. A., s. 54; Prov. I. A., s. 52.]

603. Duties of Court executing decree as to property taken in execution.—Where execution of a decree has been issued against any property of a debtor which is saleable in execution, and before the sale thereof notice is given to the Court executing the decree, in cases governed by the Presidency-towns Insolvency Act that *an order of adjudication has been made against the debtor*, and in cases governed by the Provincial Insolvency Act that *an insolvency petition by or against the debtor (y3) has been admitted*, the Court must, on application, direct the property, if in the possession of the Court, to be delivered to the Official Assignee or Receiver, but the costs of the execution will be a first charge on the property so delivered, and the Official Assignee or Receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge. The Provincial Insolvency Act also provides that the *costs of the suit in which the decree was made* are a first charge on the property so delivered.

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604. Sale by executing Court after notice of order of adjudication.—Two conditions must be satisfied before an order can be made by the Court executing the decree for delivery of the attached property to the Official Assignee or Receiver. The first is that notice must be given to the executing Court of the order of adjudication or of the admission of the insolvency petition as the case may be, and the second is that there must be an application to the executing Court for delivery of the property to the Official Assignee or Receiver. If such notice is given and such application is made, the executing Court is bound to direct the property to be delivered to the Official Assignee or Receiver. It does not, however, follow that if no such application is made, the Court executing the decree can sell the property even if it had such notice as is mentioned above. In a Bombay case under the Provincial Insolvency Act the judgment-debtor applied to be adjudged insolvent after attachment but before sale of his property in execution of a decree against him. The petition was admitted and the executing Court had notice of the admission of the petition. No application was made to the executing Court for raising the attachment and for delivery of the property to the Receiver, and the Court ordered the property to be sold and the sale proceeds to be handed over to the Receiver. The order was reversed on appeal and it was held that the executing Court having notice of the admission of the insolvency petition, was bound to stay the sale (z). In a Madras case, also under the same Act, it was said

(y3) *Basheshar Nath v. Baga Mal* ('29)
A. L. 805.(z) *Mahasukh v. Valibhai* (1928) 30Bom. L. R. 455, 109 I.C. 152,
(‘28) A. B. 177.

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that a sale by an executing Court after notice of the order of adjudication was void as against the Receiver (a). On the other hand it has been held by the High Court of Lahore (b) that if no application is made, the Court executing a decree may sell the property even if it has notice of the admission of a petition. In support of its judgment the Court relied upon *Trustee of Woolford's Estate v. Levy* (c), a case under sec. 46 of the Bankruptcy Act, 1883 (d). In that case it was held that a sale by the sheriff after a receiving order in execution of a decree against the debtor, though made with notice of the order, was valid as against the trustee in bankruptcy appointed after adjudication, if no application was made by the Official Receiver under that section for delivery of the property to him. The distinguishing features of that case are, first, that the sheriff after he came to know of the receiving order communicated with the Official Receiver and the Official Receiver wrote to the sheriff asking him to realise the goods and to account to him for the sale proceeds, and, secondly, that a receiving order under the English law does not vest the debtor's property in the Official Receiver as an adjudication order vests it in the trustee in bankruptcy. The Lahore decision, it is submitted, is erroneous.

605. Application for delivery of possession.—The application for delivery of the property to the Official Assignee or Receiver may be made by the Official Assignee or Receiver. It may, it seems, also be made by the judgment-debtor himself. It cannot be made by an interim Receiver (e), for the section now under consideration contemplates a sale of the property for the purpose of satisfying the charge on the property for the costs of execution, and an interim Receiver has no power to sell the property. There is no vesting of the debtor's property in an interim Receiver as in the case of a Receiver appointed under sec. 56 (1) of the Provincial Insolvency Act, after the making of the order of adjudication (f).

The corresponding section (sec. 35) of the Provincial Insolvency Act, 1907, provided for delivery of property to the Receiver after an order of adjudication had been made. The present section provides for an order directing the property to be delivered to the Receiver after the admission of an insolvency petition. It is difficult to conceive how such an order can ever be made for no Receiver can be appointed until adjudication. It may be observed that the corresponding clause of the Presidency-towns Insolvency Bill, as it was originally drafted, contained the words "a petition has been

(a) *Anantharama Iyer v. Kuttimalu* (1916) 30 Mad. L. J. 611, at p. 614, 34 I. C. 829.

(b) *Ralla Ram v. Labhaya* (1924) 6 Lah. L.J. 232, 80 I.C. 509, ('25) A.L. 158.

(c) (1892) 1 Q.B. 772.

(d) Now B.A., 1914, s. 41.

(e) As to the appointment of an interim receiver and his powers, see P.-t. I. A., s. 16 and Prov. I. A., s. 20.

(f) *Lyon Lord & Co. v. Virbhandas* ('26) A.S. 199; *Arunachalam Chettiar v. Naganna Naicker* ('26) A.M. 606, 94 I.C. 126.

presented against the debtor," but those words were omitted, and the words "an order of adjudication has been made against the debtor" were substituted for them. The reason given for the change was that the Official Assignee had no *locus standi* until an order of adjudication was made.

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606. Property in possession of Court.—There is a conflict of opinion whether the word "property" in the section is confined to movables only, or it also includes immovable property. It has been held in Sind that the word "property" is confined to movables only, and does not include immovable property nor does it include debts. The reason given is that immovable property is attached not by an actual seizure but by an order prohibiting the judgment-debtor from transferring or charging the property, and all persons from taking any benefit from such transfer or charge; the judgment-debtor continues in possession, and the executing Court cannot therefore be said to have possession of such property within the meaning of the section. The Court also relied on the provisions of sec. 41 of the Bankruptcy Act, 1914, where the word used is "goods" (*g*). On the other hand, it has been held by the High Courts of Bombay (*h*) and Calcutta (*i*) that the section applies to immovable property also, the reason given being that the effect of an attachment of immovable property is that the property remains in *custodia legis* during the period of attachment, and that it is immaterial whether physical possession exists or does not exist. The High Court of Calcutta has gone further and held that the section refers to the case of attachment of all kinds of property. It is submitted that the view taken by the Sind Court is not correct. The word "goods" is also used in sec. 1 (1) (e) of the Bankruptcy Act, 1914, which corresponds to sec. 9 (e) of the Presidency-towns Insolvency Act and sec. 6 (e) of the Provincial Insolvency Act. It cannot possibly be suggested that the word "property" in secs. 9 (e) and 6 (e) is confined to movables only. The reason why the two English sections are confined to goods is to be found in the peculiarities of the English law as to real property.

606A. Costs of execution.—The costs of execution to which the decree-holder is entitled include the costs of a suit (if any) brought under O. 21, r. 63, of the Code of Civil Procedure, 1908, and the costs of appeal to the High Court from the decree in such suit (*i*l).

607. Secured creditors.—The section under consideration does not affect the rights of secured creditors (*j*).

(*g*) *Lyon Lord & Co. v. Virbhandas* ('26) A.S. 199. See C.P.C. (1908) 21, rr. 43 and 52.

(*h*) *Mahasukh v. Valibhai* (1928) 30 Bom. L.R. 455, 109, I.C. 162, ('28) A.B. 177.

(*i*) *Haranchandra v. Jay Chand* (1930) 57 Cal. 122, ('29) A.C. 524.

(*i*l) *Haranchandra v. Jay Chand* (1929) 57 Cal. 122, ('29) A.C. 524.

(*j*) *Official Receiver, Tanjore v. Nagaratna* (1925) 49 Mad. L. J. 643, 92 I. C. 497, ('26) A.M. 194. See P.-t. I. A., s. 53 (2) and Prov. I. A., s. 51 (2).

LECTURE X.

PART IV.

AVOIDANCE OF VOLUNTARY TRANSFERS.

[P.-t. I. A., s. 55; Prov. I. A., 1920, s. 53; Prov. I. A., 1907, s. 36.]

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608. Avoidance of voluntary transfers.—Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the Official Assignee or Receiver. The words used in the corresponding sec. 53 of the Provincial Insolvency Act are "be voidable as against the receiver and may be annulled by the Court." This difference is immaterial, for the word "void" in sec. 55 of the Presidency-towns Insolvency Act has been held to mean "voidable."

609. History of the section.—This section is based on the Bankruptcy Act, 1883, sec. 47, now the Bankruptcy Act, 1914, sec. 42. The history of the English section begins with 1 Jac. 1, c. 15, sec. 5. Under that statute and under 6 Geo. 4, c. 16, sec. 73, and the Bankruptcy Act, 1849, sec. 126, the avoidance of a voluntary settlement was effected by an order in bankruptcy for the sale by the trustee in bankruptcy of the subject-matter of the settlement, and neither the word "void" nor the word "voidable" was used (*k*). No such mode of avoidance is prescribed by the Bankruptcy Act, 1869 (*l*), or by the Act of 1883, or the Act of 1914, but the settlements are declared to be "void against the trustee in bankruptcy."

610. Whether donee liable if money or property given has been spent or alienated.—The words in the English section are "every settlement of property," and it has been held that if there is a gift of money or proceeds of property, and the money or proceeds is or are intended to be retained or preserved for the benefit of the donee in such a form that it or they can be traced, the money or those proceeds will be property in "settlement"; but if the gift is intended to be expended at once, and not retained by the donee, it is not a "settlement" (*m*). Thus a gift of money to a son, made for the purpose of enabling him to commence business on his own account, is not a "settlement," for the gift is intended to be expended at once; and consequently the case will not fall within the English section (*n*). On the other hand, a gift of jewels from a husband to his wife, or of money with which to buy herself a present, is a "settlement" even if there is no restriction of the power of alienation by the donee, for it must be taken that the husband intended that the wife

(*k*) *Re Brall* (1893) 2 Q.B. 381, 384.(*l*) B.A., 1869, s. 91.(*m*) *Re Plummer* (1900) 2 Q.B. 790; *Re**Tankard* (1899) 2 Q.B. 57; *Re**Branson* (1914) 3 K. B. 1086.(*n*) *Re Player* (1885) 15 Q.B.D. 682.

should retain and use the gift. Such a gift is within the English section, and if the wife has still retained the property, the trustee in bankruptcy will be entitled to it (o). The word "settlement" is not used in the Indian section, but it is believed that whatever may be the nature of the gift, the donee would not be made to restore money which he had spent on property which he had alienated before the insolvency and without knowledge of the insolvent position of the donor (p). As to rights of purchasers from donees, see para. 625 below.

611. Burden of proof under this section and under sec. 53 of Transfer of Property Act.—All transfers made by the insolvent within two years before his insolvency are voidable under this section as against the Official Assignee or Receiver except ante-nuptial settlements and transfers in favour of purchasers in good faith and for valuable consideration. All that the Official Assignee or Receiver has to prove under this section is that the transfer impeached by him took place within the two years. The burden then lies on the transferee to prove that he was a purchaser (1) in good faith and (2) for valuable consideration (q). See para. 622 below.

The difference between this section and sec. 53 of the Transfer of Property Act, 1882, is that while in a case under this section no intent to defeat or delay creditors has to be proved (r), proof of such intent is always necessary in a case under sec. 53, whether the transfer is voluntary or for consideration. Under sec. 53, where a transfer is for consideration, the burden lies on the creditors attacking the transfer to prove in the first instance that it was made with intent to defeat or delay creditors; if such intent is proved, the burden lies on the transferee to show that he is a purchaser in good faith and for consideration (s). If the transfer is voluntary, the burden again lies on the creditors to show that it was made with intent to defeat or delay creditors, unless the effect of the transfer has been to defeat or delay creditors in which case the transfer will be *presumed* to have been made with such intent.

612. Exclusive jurisdiction of Insolvency Court.—It has already been stated that in respect of claims arising out of the insolvency, the Official Assignee or Receiver has a higher title than the insolvent and that he is entitled to impeach transactions which the insolvent himself could not have done had he not been adjudged insolvent. Voluntary transfers and transfers by way of fraudulent preference belong to this class. Under the

- (o) *Re Vansittart* (1893) 1. Q. B. 181.
(p) See *Re Tankard* (1899) 2 Q.B. 57, 60; *Re Branson*. (1914) 3 K. B. 1086, 1091-1092.
(q) *Hemraj Champa Lall v. Ramkishan Ram* (1917) 2 Pat. L. J. 101, 38 I. C. 369; *Official Receiver v.*

- Vadappa Mudaliar* (1924) 47 Mad. L.J. 431, 82 I.C.450, ('24)A.M. 865.
(r) *Ramaswami Aiyangar v. Official Receiver* (1926) 50 Mad. L. J. 448, 94 I. C. 535, ('26) A. M. 872.
(s) *Amarchand v. Gokul* (1903) 5 Bom. L. R. 142.

Para. 612 English law, the Court of Bankruptcy has full power to decide all questions arising out of bankruptcy where the trustee claims by a higher title than the bankrupt, but this jurisdiction is not exclusive, as where questions of character are involved or the amount at stake is a large one, in which case the Court may leave the matter to be tried by the ordinary tribunals. The last English case, it is believed, in which this was done was *Sharp v. McHenry* (t). In that case a mortgagee commenced an action in the Chancery Division against the trustee in bankruptcy for an account of what was due to him on the security of a bill of sale, and to enforce the security by foreclosure or sale. The trustee applied for a stay of the action on the ground that the same questions would have to be determined on the hearing of an application in bankruptcy as those which arose in the action, namely, whether the bill of sale was or was not fraudulent and void, and that such questions would be better tried in the Court of Bankruptcy than in the Chancery Division. The motion was heard by Kay, J., and the learned Judge refused to grant a stay. The learned Judge referred to a number of cases all considered in paragraphs 59 and 62C above, and held that the jurisdiction of the Court of Bankruptcy even as to cases in which the trustee claimed by a paramount title was not exclusive, and that the amount involved being a very large one and issues having been already raised, the action should be allowed to proceed. The following is a statement of the law as established by Indian decisions :—

The jurisdiction to set aside transactions which are good against the insolvent but not against the general body of creditors is an exclusive jurisdiction of the Insolvency Court (u). The transactions in the nature of voluntary transfers or of fraudulent preference are transactions which are valid as between the insolvent and the transferee, but voidable as against the Official Assignee or Receiver as representing the general body of the insolvent's creditors. The Insolvency Court alone has jurisdiction to annul these transactions, whether the case is one under the Presidency-towns Insolvency Act (v) or under the Provincial Insolvency Act (w). Thus where property was attached in execution of a decree against a debtor, and the debtor was afterwards adjudged insolvent, and the debtor's wife claiming that she had purchased the property from her husband for value and in good faith brought a suit against her husband, the attaching creditors and the Receiver for a

(t) (1887) 55 L.T. 747.

(u) *Official Receiver v. Palaniswami Chetti* (1925) 48 Mad. 750, 757, 88 I. C. 934, ('25) A.M. 1051.

(v) *Official Assignee of Bombay v. Sundarachari* (1927) 50 Mad. 776, 102 I. C. 702, ('27) A. M. 684.

(w) *Official Receiver v. Palaniswami Chetti* (1925) 48 Mad. 750, 757, 88 I. C. 934, ('25) A.M. 1051; *Shah-*

zada Begam v. Gokul Chank (1927) 2 Luck. 651, 105 I. C. 50, ('27) A. O. 357; *Kaniz Fatima v. Narain Singh* (1927) 49 All. 71, 98 I. C. 1001, ('27) A. A. 66; *Mariappa Pillai v. Raman Chettiyar* (1919) 42 Mad. 322, 52 I. C. 319. See also *Shikri Prasad v. Aziz Ali* (1922) 44 All. 71, 72, 63 I. C. 601, ('22) A.A. 196.

declaration that she was a purchaser in good faith and for value, and the Receiver subsequently applied under this section to set aside the transfer on the ground that it was voluntary, it was held that the Insolvency Court alone had jurisdiction to set aside the transfer, and that the Civil Court had no jurisdiction to try the suit, such a suit being impliedly barred, within the meaning of sec. 9 of the Code of Civil Procedure, 1908, by the provisions of the Insolvency law (x). It makes no difference that the party suing is the transferee or the Official Assignee or Receiver (y). If the Insolvency Court annuls a transfer as being voluntary, a subsequent suit in a Civil Court for a declaration that the transfer is valid would be barred as *res judicata* (z). See p. 48, "Exclusive jurisdiction."

613. Suits by secured creditors to realise their security.—The rights of secured creditors to realise their security have been expressly saved by both the Acts (a). The presentation of an application by the Official Assignee or Receiver to set aside a mortgage under this section is no bar to a mortgagee's suit for sale nor does it operate in itself as a stay of the suit if one has already been filed; but the Court in which the suit is filed may stay the suit (b).

If instead of pursuing his remedy in a Civil Court, the mortgagee avails himself of the provisions of the Presidency-towns Insolvency Act, and applies to the Insolvency Court for a sale of the mortgaged property under Sch. II, rule 18, then, if an application is made by the Official Assignee under this section to set aside the mortgage, the Insolvency Court has the power to stay the proceedings for sale and it may stay them pending the final disposal of the application of the Official Assignee (c).

614. Application to set aside voluntary transfers—

(1) *Contents of application.*—The application should set out all material facts as in a pleading (d).

(2) *Who may apply.*—In cases governed by the Provincial Insolvency Act, it is provided by sec. 54A that a petition for the annulment of any transfer under sec. 53 or of any transfer, payment, obligation or judicial proceeding under sec. 54, may be made by the Receiver or, with the leave of the Court, by any creditor who has proved his debt and who satisfies the Court that the Receiver has been requested and has

(x) *Shahzade Begum v. Gokul Chand Rai* (1927) 2 Luck. 651, 105 I. C. 50, ('27) A.O. 357.

(y) *Mariappa Pillai v. Raman Chettiay* (1919) 42 Mad. 322, 323, 324, 52 I. C. 519.

(z) *Kaniz Fatima v. Narain Singh* (1927) 49 All. 71, 98 I.C. 1001, ('27) A. A. 66. See Prov. I. A., s. 4 (2).

(a) P.-t. I. A., ss. 17, 53 (2); Prov. I. A. ss. 28 (6), 51 (2).

(b) *Official Receiver v. Palaniswami Chetti* (1925) 48 Mad. 750, 88 I. C. 934, ('25) A. M. 1051.

(c) *Tyab Ali v. Purna* (1926) 43 Cal. L. J. 219, 93 I.C. 898, ('26) A.C. 618.

(d) *Chunnoo Lal v. Lachman Sonar* (1917) 39 All. 391, 42 I. C. 841.

Para. 614 refused to make such petition. Sec. 54A was added by Act 39 of 1926. It sets at rest the conflict of opinion which prevailed at one time as to whether an application under this section can be made only by the Receiver or whether it can also be made by a creditor if the Receiver refuses to make it. In cases governed by the Presidency-towns Insolvency Act, the practice in Calcutta and Bombay has been to grant leave to a creditor who has proved his debt to apply to set aside a transfer under sec. 55 of that Act, if the Official Assignee on being tendered a reasonable indemnity, unreasonably refuses to make the application (e); and this is in accordance with the English practice. The High Court of Rangoon has held that no such leave can be granted to a creditor, and that if the Official Assignee refuses to make the application, the only remedy open to the creditor is to appeal from his decision under sec. 86 of the Act (f). This does not seem to be the correct view.

(3) *Application by whom to be heard.*—The Insolvency Court itself must dispose of an application to set aside a voluntary transfer. It has therefore no power to refer the matter to a subordinate Court, e.g., a Munsif's Court, for a report whether a transfer is *bona fide* and for value (g). Nor has it any power, where such an application has been made, to refer the parties to a suit in a Civil Court (h). Further, the application should be heard and disposed of by the Court itself and not by the Official Assignee or Receiver (i). The Court has no power to set aside a transfer at the time of making an order of adjudication before the appointment of a Receiver even if the act of insolvency on which the petition for adjudication is founded is that very transfer (j).

(4) *Effect of annulment on application.*—After the adjudication has been annulled and the property has reverted in the insolvent, the application to avoid a voluntary transfer cannot be proceeded with, and should be dismissed (k). But if while annulling the adjudication, the Court has made an order vesting the property in some person appointed by the Court, he may prosecute the application (kl).

(5) *Limitation.*—Art. 181 of the Indian Limitation Act, 1908, does not apply to an application under this section. There is no period of limitation provided for such an application, and it may be made at any time during the pendency of the insolvency proceedings (l).

- (e) *Tyeb Ali v. Purna* (1926) 43 Cal. L. J. 219, 93 I.C. 898, ('26) A.C. 618; *Re Surajmull Munghchand* (1921) 26 C.W.N. 803, 70 I.C. 463, ('21) A.C. 403.
- (f) *In the matter of the estate of P. A. Mohamed Ganny* (1927) 5 Rang. 375, 104 I.C. 89, ('27) A.R. 284.
- (g) *Jagannath v. Lachman Das* (1914) 36 All. 549, 26 I. C. 32.
- (h) *Khushali Ram v. Bholar Mal* (1915) 37 All. 252, 28 I.C. 573.
- (i) *Muthuswami Chettiar v. Official Receiver* (1926) 51 Mad. L. J. 287, 97 I.C. 407, ('26) A.M. 1019; *Krishna Iyer v. Official Receiver*

- (j) ('25) A.M. 381, 75 I.C. 445.
- (j) *Appireddi v. Appireddi* (1922) 45 Mad. 189, 66 I. C. 271, ('22) A.M. 246.
- (k) *Maung Hme v. U. Po Seik* (1925) 3 Rang. 201, 86 I.C. 324, ('25) A.R. 301.
- (kl) *Jethaji Peraji Firm v. Krishnayya* (1920) 52 Mad. 648.
- (l) *Ramaswamiiah v. Subramania Aiyar* ('25) A.M. 172, 79 I.C. 443 [I.A., 1907, s. 36]; *Daryai Singh v. Kunj Lal* ('24) A.L. 553, 75 I. C. 995; *Ananthanarayanna Ayyar v. Santaranarayanna* (1924) 47 Mad. 673, 79 I. C. 395, ('24) A. M. 345.

615. Settlement in consideration of marriage.—Though a settlement made before and in consideration of marriage is protected, it may be set aside if it is fraudulently made to defeat or delay creditors and both spouses are parties to the fraud (*m*).

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616. "Purchaser for valuable consideration."—The word "purchaser" is not limited to a purchaser in the legal or mercantile sense. It means any person who has given valuable consideration (*n*). In order to constitute a person a "purchaser for valuable consideration" within this section, it is not necessary that either money or physical property should be given; the release of a right, or the compromise of a claim, may be sufficient (*o*). But there must be a real consideration or *quid pro quo* (*p*). A trustee under a deed of transfer executed by a debtor for the benefit of the general body of his creditors is not a purchaser for valuable consideration (*q*). A gift by a husband to his wife is a transfer without consideration and will be set aside under this section (*r*). A transfer, however, by a Mahomedan husband to his wife or dower due to her may be a valuable consideration (*s*).

The fact that a conveyance is expressed to be for valuable consideration does not oblige the Court to hold it to be for valuable consideration if no such consideration was really given (*t*). On the other hand, a deed though in form voluntary will be supported if it is shown to have been made for valuable consideration (*u*).

617. Transfer partly for and partly without consideration.—*A* executes a mortgage of his property three months before his insolvency to *B*. The consideration as stated in the document consists of two debts, one of Rs. 2,000, due by *A* to a secured creditor, and the other of Rs. 1,000, due by *A* to an unsecured creditor, both of which *B* agrees to discharge, and a cash payment of Rs. 3,000. It is proved that *B* paid the two debts. It is also proved that the Rs. 3,000 was never paid, and that the object of inserting that sum in the document was to secrete that money for the insolvent's benefit. In such a case the proper course is to set aside the

- (*m*) See *Colombine v. Penhall* (1853) 1 Sm. & Giff. 228, 65 E.R. 98 [settlement held to be act of bankruptcy]; *Kewan v. Crawford* (1877) 6 Ch. D. 29; *Re Pennington* (1888) 5 Morr. 216, 268.
- (*n*) *Hance v. Harding* (1888) 20 Q.B.D. 732; *Official Receiver v. Somasundaram* (1916) 30 Mad. L.J. 415, 34 I.C. 602.
- (*o*) *Re Pope* (1908) 2 K.B. 169; *Re Collins* (1914) 112 L.T. 87; *Re Charters* (1923) B. & C.R. 94.
- (*p*) *Re Parry* (1904) 1 K.B. 129 [substitution of one trust asset for

- another is not a consideration].
- (*q*) *Official Receiver, Cuddapah v. Subbiah* (1927) 50 Mad. 815, 105 I.C. 138, ('27) A.M. 869.
- (*r*) *Bhut Nath v. Biraj Mohini* (1918) 28 Cal. L.J. 536, 47 I.C. 524.
- (*s*) *Muhammad Habib-ullah v. Mushtaq Husain* (1917) 39 All. 95, 37 I.C. 684.
- (*t*) *Walker v. Burrows* (1745) 1 Atk. 93, 26 E.R. 61.
- (*u*) *Pott v. Todhunter* (1845) 2 Col. 76, 63 E.R. 644; *Bayspoole v. Collins* (1871) L. R. 6 Ch. App. 228.

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deed in its entirety, but *B* should be allowed to rank as a secured creditor to the extent of Rs. 2,000 and as an unsecured creditor to the extent of Rs. 1,000 (v).

618. "In good faith."—Good faith must be on the part of the purchaser; it is not necessary that both parties to the transaction should act in good faith (w). In determining the question whether a transfer was made in good faith, the Court should take into account all the circumstances which surrounded the transaction, the covenants contained in the deed and the conduct contemporaneous and subsequent of the parties (x). Where a creditor obtained a pledge of all the goods of his debtor to secure a pre-existing debt with knowledge of the insolvent position of the debtor, and there was no present advance nor any agreement to make a future advance, and the debtor was adjudged insolvent within eight months after the date of the pledge, it was held that the transaction was not in good faith (y). A transfer cannot be partly in good faith and partly not so (z).

619. Onus of proving good faith and consideration.—The burden of proving consideration and good faith lies on the purchaser or incumbrancer (a). The fact that the Official Assignee or Receiver has admitted the transaction at an earlier stage does not alter the burden of proof at the hearing of the application by the Court (b). If a person in insolvent circumstances transfers the whole of his property to one of his creditors in consideration of a past debt by an antedated deed, and the transferee is aware of the insolvent circumstances of the transferor, the transferee is not a purchaser in good faith within the meaning of this section (c).

620. "Void."—The word "void" has been used in the English section since the Bankruptcy Act, 1869. The same word is used in the Presidency-towns Insolvency Act, and it was used in the Provincial

- (v) *Ramaswami Aiyangar v. Official Receiver* (1926) 50 Mad. L. J. 448, 94 I. C. 535, ('26) A.M. 672; *Ramprasad v. Seth Jas Karan* 82 I. C. 489, ('25) A. N. 73; *Devi Dial v. Sunder Das* (1919) Punj. Rec. No. 65, p. 163, 51 I. C. 720.
- (w) *Mackintosh v. Pogose* (1895) 1 Ch. 505; *Re Naraindas Sunderdas* 93 I. C. 331, ('26) A. S. 133.
- (x) *Official Receiver v. Vedappa Mudaliar* (1924) 47 Mad. L. J. 431, 82 I. C. 450, ('24) A. M. 865; *Narayana v. Nathu* 103 I. C. 486, ('27) A. N. 166.
- (y) *Official Assignee of Bengal v. Yokohama Specie Bank* (1924) 29 C.W.N. 374, 87 I. C. 392, ('25) A. C. 640.
- (z) *Ramaswami Aiyangar v. Official Receiver* (1926) 50 Mad. L. J. 448, 451, 94 I. C. 535, ('26) A. M. 672.
- (a) *Official Assignee of Bengal v. Yokohama Specie Bank* (1924) 29 C. W. N. 374, 378, 87 I. C. 392, ('25) A.

- C. 640; *Official Assignee, Madras v. Sheik Moideen Rowther* (1927) 50 Mad. 948, 106 I. C. 61, ('27) A. M. 1013; *Official Receiver v. Vedappa Mudaliar* (1924) 47 Mad. L. J. 431, 82 I. C. 450, ('24) A. M. 865; *Hemraj Champa Lall v. Ramkishan* (1917) 2 Pat. L. J. 101, 38 I. C. 369; *Muhammad Habib-ullah v. Mushtaq Husain* (1917) 39 All. 95, 37 I. C. 684; *Basanti Bai v. Nanhe Mal* (1925) 47 All. 864, 89 I. C. 357, ('26) A. A. 29; *Official Assignee v. Roopjee* (1928) 6 Rang. 676, 115 I. C. 903, ('29) A. R. 60; *Durga Das v. Kundan Lal* 91 I. C. 4, ('26) A. L. 307.
- (b) *Official Assignee, Madras v. Sambanda Mudaliar* (1920) 43 Mad. 739, 60 I. C. 205.
- (c) *Official Assignee, Madras v. Sheik Moideen Rowther* (1927) 50 Mad. 948, 106 I. C. 61, ('27) A. M. 1013.

Insolvency Act, 1907. The word "void" has always been held to mean "voidable" (d), and the latter word is used in the Provincial Insolvency Act, 1920.

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621. Terminus a quo for calculating the period of two years :

(1) *Under the Presidency-towns Insolvency Act.*—Sec. 55 of the Presidency-towns Insolvency Act provides for the avoidance of voluntary transfers if the transferor "is adjudged insolvent within two years after the date of the transfer." The words "is adjudged insolvent" correspond to the words "becomes bankrupt" in sec. 47 of the Bankruptcy Act, 1883 (Bankruptcy Act, 1914, sec. 42). The words "becomes bankrupt" in the English section mean "commits the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition," and they refer to the date when the bankruptcy commences (d1). The words "is adjudged insolvent" in sec. 55 of the Presidency-towns Insolvency Act have the same meaning as the words "becomes bankrupt," and the *terminus a quo* for the calculation of the period of two years is the date of the commission of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition as provided by sec. 51 of the Act.

(2) *Under the Provincial Insolvency Act.*—Sec. 53 of the Provincial Insolvency Act as amended by sec. 6 of the Insolvency Law (Amendment) Act, 1930, provides for the avoidance of voluntary transfers if the transferor "is adjudged insolvent on a petition presented within two years after the date of the transfer." The words "on a petition presented" were inserted in the section by the amending Act, and the *terminus a quo* for the calculation of the period of two years under the section as amended is the date of the presentation of the petition. The result is that a voluntary transfer, if made within two years before the date of the presentation of the insolvency petition, may be avoided under this section, even if the transfer was made more than two years before the date of the order of adjudication.

Before the amendment there was a conflict of decisions whether the period of two years was to be calculated backwards from the date of the order of adjudication or from the date of the presentation of the petition. It was held in Bombay (e), Lahore (f), Rangoon (g), and Sind (h), that it was to be calculated backwards from the date of the order of adjudication, the reason given being that the words used were "is adjudged insolvent" which could only refer to the actual date of adjudication, and that the doctrine of relation back (i) could not be imported into this section. On the other

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| <p>(d) <i>Re Brall</i> (1893) 2 Q.B. 381 [B.A., 1883, s. 47]; <i>Mariappa Pillai v. Raman Chettiar</i> (1919) 42 Mad. 322, 52 I.C. 519; <i>Official Receiver v. Somasundaram Chettiar</i> (1916) 30 Mad. L. J. 415, 34 I.C. 602; <i>Abdul Khadar Sahib v. Official Assignee, Madras</i> (1913) 25 Mad. L. J. 308, 20 I.C. 485.</p> <p>(d1) <i>Re Reis</i> (1904) 1 K. B. 451.</p> <p>(e) <i>Nagindas v. Gordhandas</i> (1925) 49 Bom. 730, 88 I.C. 941, ('25) A.B.</p> | <p>480.</p> <p>(f) <i>Hemraj v. Krishna Lal</i> (1929) 10 Lah. 106, ('28) A. L. 361, 111 I.C. 8.</p> <p>(g) <i>Maung Pe v. Maung Po Hein</i> (1928) 6 Rang. 193, 110 I.C. 361, ('28) A.R. 148.</p> <p>(h) <i>Official Receiver v. Tirathdas</i> 90 I.C. 970, ('27) A.S. 66 [Prov. I. A., 1920, s. 53]; <i>Atmaram v. Dayaram</i> ('29) A.S. 94, 115 I. C. 330.</p> <p>(i) Prov. I. A., s. 28 (7).</p> |
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hand it was held in Calcutta (j), Madras (k), Allahabad (l), and Nagpur (m), that the period was to be calculated backwards from the date of the presentation of the petition on which the order of adjudication was made. The reason given was that the section had to be read with the relation back clause, which was a general clause, and under that clause an order of adjudication related back to and took effect from the date of the presentation of the petition on which it was made. According to this view, an application to set aside a voluntary transfer could be made under this section even if the transfer was made more than two years before the date of the order of adjudication, provided it was made within two years before the date of the presentation of the petition. The judgments of the Calcutta and Madras Courts seem to have been influenced mainly by two considerations, namely, (1) that the corresponding expression in the English section was "becomes bankrupt" (n), and that that expression had been held to mean "commits an available act of bankruptcy which marks the commencement of the bankruptcy" (o); and (2) that if the period of two years were to be calculated from the date of the order of adjudication, it might happen that the period had elapsed before the order of adjudication had actually been made, owing either to the delays in Courts or to the conduct of the insolvent himself who would be interested in seeing that the proceedings were delayed. The amendment gives effect to the Calcutta and Madras decisions.

622. Transfers executed more than two years before insolvency.—A voluntary transfer, that is, a transfer without consideration, may be a settlement or it may take the form of a sale or of a mortgage or of a lease or some other form (p). A transfer without consideration may fall into three classes, namely,—

- (1) it may be valid when it was made, e.g., where it is a *bona fide* settlement in favour of the family of the transferor; or
- (2) it may be voidable as where it is made with intent to defeat or delay creditors within the meaning of sec. 53 of the Transfer of Property Act, 1882; or
- (3) it may be one which does not pass any interest to the transferee, as where it is benami or fictitious.

A transfer falling under the first class is not impeachable except under the Insolvency law, and that too only if the settlor is adjudged insolvent within two years after the date of the transfer as provided by this section. If the transferor is not adjudged insolvent within that period, the settlement can never afterwards be impeached (q).

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| <p>(j) <i>Rakhil Chandra v. Sudhindra Nath Bose</i> (1919) 46 Cal. 991, 52 I.C. 717. See also <i>Hemraj Champa Lal v. Ramkishan Ram</i> (1917) 2 Pat. L.J. 101, 38 I.C. 369.</p> <p>(k) <i>Rangiah v. Appaji Rao</i> (1927) 50 Mad. 300, 99 I.C. 241, ('27) A.M. 163; <i>Sankaranayana v. Alagiri Aiyar</i> (1918) 35 Mad. L. J. 296, 49 I.C. 283.</p> <p>(l) <i>Sheonath Singh v. Munshi Ram</i> (1920) 42 All. 433, 55 I.C. 941.</p> <p>(m) <i>Bansilal v. Rangalal</i> 68 I. C.</p> | <p>605, ('23) A. N. 98.</p> <p>(n) B.A., 1883, s. 47; B.A., 1914, s. 42.</p> <p>(o) <i>Re Reis</i> (1904) 1 K.B. 451.</p> <p>(p) <i>Kanaya Lal v. Official Receiver</i> (1924) 110 I.C. 742, ('28) A.L. 750.</p> <p>(q) <i>Dronadulu Sriramulu v. Ponakavira Reddi</i> (1923) 45 Mad. L.J. 105, 114, 72 I. C. 805, ('23) A.M. 641; <i>Mariappa Pillai v. Raman Chettigar</i> (1919) 42 Mad. 322; 52 I.C. 519; <i>Hari Chand Rai v. Moti Ram</i> (1926) 48 All. 414, 94 I.C. 429, ('26) A.A. 470.</p> |
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A transfer falling under the second or third class may be avoided under the section, if the transferor is adjudged insolvent within two years after the date of the transfer. If the transferor is not so adjudged within that period, the transfer is not avoided by this section (r). But it may be impeached by a regular suit, or, as held in cases under the Provincial Insolvency Act, by an application under sec. 4 of that Act (s). In that case the burden of proving want of consideration and good faith will lie on the Receiver, and not on the transferee (see para. 611 above). Similar cases under the Presidency-towns Insolvency Act will be governed by sec. 7 of that Act as amended by Act 19 of 1927 (see para. 62A above).

623. Extent of avoidance.—A transfer avoided under this section is only avoided so far as may be necessary for the payment of the debts of the insolvent and costs of the insolvency, and the surplus of the settled property, if any, remains bound by the trusts of the settlement (t). The same rule applies to other kinds of transfers.

624. Encumbrances created by settlor after settlement.—The avoidance of a voluntary settlement under this section vests the property through the settlor in the Official Assignee or Receiver. It does not entitle the Official Assignee or Receiver to stand in the place of beneficiaries so as to obtain priority over mortgages and incumbrances subsequent to the settlement (u).

625. Transferees from donees.—The transfer is voidable not from its date but only from the date when the title of the Official Assignee or Receiver accrues, that is to say, the commencement of the insolvency (v). Consequently a purchaser or a mortgagee for value and in good faith from a donee under a voluntary transfer *before* the commencement of the insolvency has a good title against the Official Assignee or Receiver. The mere fact that the purchaser has notice that the donee's title is based on a voluntary transfer does not prevent him from claiming as a purchaser in good faith,

(r) See *Ram Lal v. Mahadeo* (1928) 3 Luck. 373, 110 I.C. 113, ('28) A.O. 404. The *dicta* in this case that an adjudication can be annulled if the insolvent has suppressed his property are not correct.

(s) *Atmaram v. Dayaram* ('20) A.S. 94, 115 I.C. 330; *Haji Anwar Khan v. Md. Khan* (1929) 51 All. 550, 113 I.C. 819, ('20) A.A. 105; *Shikri Prasad v. Aziz Ali* (1922) 44 All. 71, 63 I.C. 601, ('22) A.A. 196; *Hari Chand Rai v. Moti Ram* (1926) 48 All. 414, 94 I.C. 429, ('26) A.A. 470. See also *Official Receiver v. Bastiao*

Souza ('26) A.M. 826, 95 I.C. 300, a case of a suit by the Official Receiver to set aside a transfer as being fraudulent within the meaning of s. 53 of the Transfer of Property Act, 1882, the transfer being one within two years.

(t) *Re Sims* (1896) 3 Mans. 340; *Re Purry* (1904) 1 K.B. 120; *Official Receiver v. Palaniswami Chetti* (1925) 48 Mad. 750, 757, 88 I.C. 934, ('25) A.M. 1051.

(u) *Sanguinetti v. Stuckley's Banking Co.* (1895) 1 Ch. 176.

(v) *Re Brall* (1893) 2 Q.B. 381.

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if he has no notice that the settlor was insolvent, and no notice of any fact avoiding the settlement (w). It follows that the purchaser cannot refuse to complete on the ground that the transfer under which his vendor claims was voluntary and that the period of two years mentioned in the section has not expired (x). It has also been held in England on general equitable principles that a purchaser for value and in good faith from the donee, even after an act of bankruptcy to which the title of the settlor's trustee in bankruptcy relates, is entitled to hold the property against such trustee, provided he had no notice of the act of bankruptcy (y).

626. Trustees' lien for costs.—Where a settlement originally valid is avoided under this section, the trustees of the settlement are entitled to a lien on the trust property for all expenses properly incurred by them as trustees in the performance of trust duties, as for instance in defending the settlement against the settlor (z). If the trustees oppose the claim of the Official Assignee or Receiver to set aside the deed under this section, they will be entitled, even if the deed is set aside, to retain their costs out of the trust fund, provided they have acted properly in the discharge of their duties as trustees and not put the Official Assignee or Receiver to unnecessary expense (a). If, however, they appeal, and the appeal is dismissed, they are not entitled to retain the costs of the appeal out of the trust fund (b).

627. Set-off.—If money has been settled under a voluntary settlement which is avoided, the beneficiary cannot set off a debt due from the settlor to the beneficiary against the amount payable to the trustee in bankruptcy. Thus where a payment of £250 by a bankrupt to his wife before bankruptcy was declared void against the trustee in bankruptcy as a voluntary settlement, and the trustee sued the wife to recover that sum, it was held that the wife could not set off a debt due to her from the bankrupt at the date of the bankruptcy against the sum of £250. Set-off in bankruptcy is allowed only in the case of mutual debts, and the sum settled was not a debt due by the wife to the bankrupt (c).

628. Property outside local limits.—It has been held by the High Courts of Calcutta and Madras that the Insolvency Court has power to deal with transfers made by the debtor of property situate outside the limits of the original civil jurisdiction of the Court and that this power is not

- (w) *Re Carter & Kenderdine's Contract* (1897) 1 Ch. 776; *Sudha v. F. Nanak Chand* (1925) 7 Lah. L.J. 160, 88 I.C. 89, ('25) A.L. 295; *Ponnammai Ammal v. District Official Receiver* (1926) 49 Mad. 403, 90 I.C. 1033, ('26) A.M. 160.
(x) *Re Carter & Kenderdine's Contract*,

- supra*.
(y) *Re Hart* (1912) 3 K. B. 6.
(z) *Re Holden* (1887) 20 Q.B.D. 43.
(a) *Merry v. Pownall* (1898) 1 Ch. 306; *Ideal Bedding Co. v. Holland* (1907) 2 Ch. 157.
(b) *Ex parte Russell* (1882) 19 Ch.D. 588.
(c) *Lister v. Hooson* (1908) 1 K.B. 174.

affected by the provisions of sec. 16 of the Code of Civil Procedure, 1908, or of cl. 12 of the Letters Patent (d).

Paras.
628-630

629. Report of Receiver.—A report made by the Official Receiver in proceedings under this or the next section is not *per se* legal evidence on which a finding could be based by the Court (e).

630. Transfer under order of Court.—Where an order is made by the Court under O. 20, r. 11 (2), of the Code of Civil Procedure, 1908, directing the judgment-debtor to execute a mortgage of his property to the decree-holder, the subsequent adjudication of the judgment-debtor could not affect the rights of the decree-holder to have the mortgage executed in his favour. Such a transaction is not affected by this section or by the fraudulent preference section (f).

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| <p>(d) <i>Lalji Shai Singh v. Abdul Gani</i> (1910) 15 C.W.N. 253, 257, 7 I.C. 765; <i>Abdul Khader v. The Official Assignee</i> (1917) 40 Mad. 810, 36 I.C. 524, affirmed in <i>Re Kancherla Krishna Rao</i> (1928) 51 Mad. 540, 112 I.C. 149, ('28) A.M. 732.</p> | <p>(e) <i>Basanti Bai v. Nanhe Mal</i> (1925) 47 All. 864, 89 I.C. 357, ('26) A.A. 29.</p> <p>(f) <i>Allan Bros. & Co. v. Shaik Jooman & Sons</i> (1924) 2 Rang. 673, 85 I.C. 291, ('25) A.R. 189.</p> |
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LECTURE X.

PART V.

AVOIDANCE OF FRAUDULENT PREFERENCE.

[P.-t. L. A., s. 56 ; Prov. L. A., ss. 54, 54A.]

Paras.

631, 632

631 Fraudulent preference: Object of the doctrine.—The statutes of bankruptcy prior to the Bankruptcy Act, 1869, did not contain any express provision relating to fraudulent preference. The doctrine of fraudulent preference, however, was recognised long before that Act. It was originally of judicial creation, and it is considered to have been introduced by Lord Mansfield (g). The doctrine was enunciated by him in 1786 in *Thompson v. Freeman* (h) thus: "A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor." If he did so, it was regarded as a "fraud" upon the statutes of bankruptcy, and the transaction was called "fraudulent preference." The transaction was treated as fraudulent, not because it contravened any express provision of the bankruptcy laws, for there was none such, but because it was contrary to the principle and spirit of those laws. It was contrary to the spirit of the bankruptcy laws because it defeated the equal distribution of the bankrupt's property contemplated by those laws (i). The old law was stated in another case (j) thus: "If a man at a time when he contemplates bankruptcy delivers goods or money into the hands of a creditor whom he intends to benefit, the transaction is perfectly valid between the parties; but if bankruptcy supervenes and there is an adjudication against the transferor or donor, it is a fraudulent preference and invalid as against the assignees, not under any express provision in the bankruptcy laws, but as contrary to the spirit and principle of those laws." There is no moral turpitude in a debtor paying a just debt due to a creditor, though he may then be on the eve of insolvency and though he makes the payment with the object of preferring that creditor over his other creditors. It is a perfectly moral transaction in itself, and a perfectly valid transaction between the parties. It is only if the debtor is adjudged insolvent on a petition presented within three months after the date of the transaction that the law treats the payment as fraudulent and void as against the Official Assignee or Receiver. It will be so treated even if the preferred creditor had no knowledge of the debtor's insolvent position or of the debtor's intention to prefer him (k).

632. Previous enactments.—Though the fraudulent preference section is to a great extent an embodiment of the old rules of bankruptcy, the doctrine having been put into definite shape and form by statute, and definite

- (g) *Alderson v. Temple* (1767) 4 Burr. 2235, 2241, 98 E.R. 165, 168.
 (h) (1786) 1 T.R. 155, 99 E.R. 1026.
 (i) *Alderson v. Temple* (1767) 4 Burr. 2235, 98 E.R. 165.

- (j) *Marks v. Feldman* (1870) L. R. 5 Q.B. 275, 279.
 (k) *Marks v. Feldman* (1870) L.R. 5 Q. B. 275, 279, 283.

tests having been prescribed by statute, the primary duty of the Courts is to construe the words of the statute rather than to depend on the decisions prior to the statutory definition (*l*). Statutory provision constituting fraudulent preference first appeared as a positive enactment in the Bankruptcy Act, 1869, being sec. 92 of the Act. That section, except the saving clause at its end which will be referred to presently, was substantially repeated in sec. 48 of the Bankruptcy Act, 1883. The section of the Indian Acts is based on sec. 48 of the Act, 1883. The corresponding section of the Bankruptcy Act, 1914, is sec. 44. The last mentioned section sets at rest certain doubts which arose on the construction of sec. 48 of the Act, 1883. The corresponding section in the Indian Insolvency Act, 1848, was sec. 24, and in the Provincial Insolvency Act, 1907, it was sec. 37.

**Paras.
632-634**

632A. Exclusive jurisdiction of Insolvency Court.—This subject has been discussed in paragraph 612 above.

633. Essentials of fraudulent preference.—Every transfer by a debtor of his property (this includes a mortgage or a charge), every payment made, every obligation incurred, and every judicial proceeding affecting his property (*m*) taken or suffered by him, is fraudulent and void as against the Official Assignee or Receiver provided five conditions are fulfilled. These conditions are :—

- (1) the debtor must at the date of the transfer or payment be unable to pay from his own money his debts as they become due ;
- (2) the transfer or payment must be in favour of a creditor ;
- (3) the transfer or payment in fact prefers one creditor over others ;
- (4) the transfer or payment must have been made with a view of giving such creditor a preference over other creditors ; and
- (5) the debtor must be adjudged insolvent on a petition presented within three months after the date of the transfer or payment (*n*).

If any of the above conditions is not satisfied, the transaction will not be void as a fraudulent preference. Thus it is not sufficient that a creditor is preferred, if it was not the insolvent's object to prefer him ; and even if it was, the transfer or payment cannot be impeached as fraudulent if no insolvency petition is presented within three months after the date of the transfer or payment.

634. (1) Inability to pay debts.—The first condition in establishing a fraudulent preference is that the debtor must at the date of the transaction be unable to pay his debts as they become due from his own money. The fact that the debtor has money tied up which at a later date may be available for the payment of his debts is immaterial (*o*).

(*l*) *Ex parte Griffith* (1883) 23 Ch. D. 69 ;
Ex parte Hill (1883) 23 Ch. D. 695.
(*m*) *Ex parte Lancaster* (1884) 25 Ch.D.
311 ; *Butcher v. Stead* (1875)
L.R. 7 H. L. 839, 848.

(*n*) *Re Cohen* (1924) B. & C.R. 143, 158.
(*o*) *New Prince and Garrard's Trustee v. Hunting* (1897) 1 Q.B. 607 ;
Nripendra Nath v. Ashulose Ghosh
(1915) 20 C.W.N. 420, 33 I.C. 548.

Paras.
634, 635

Under the law prior to the Bankruptcy Act, 1869, it was necessary, to avoid a transaction as a fraudulent preference to prove (1) that the act was voluntary, and (2) that it had been done in contemplation of bankruptcy. Both these conditions involved an inquiry into the state of the debtor's mind. Certain changes in the law were introduced by sec. 92 of the Bankruptcy Act, 1869. The fraudulent preference sections both in the English and the Indian Acts now in force are substantially a reproduction of the provisions of sec. 92 of the Bankruptcy Act, 1869. The position under the present law is this: the first requisite that the act must have been voluntary still remains, for the word used in the present fraudulent preference section is "preference" and this implies an act of *free will*. To that extent the necessity of an inquiry into the state of the debtor's mind still remains. The second requisite, namely, that the act must have been done *in contemplation of bankruptcy* is superseded by the first and fifth conditions mentioned above, and it is no longer necessary to prove that the act was done in contemplation of bankruptcy. What is now necessary to prove is (1) that the debtor was, when he made the transfer or payment, unable to pay his debts as they became due out of his own money, in other words, that the preferential transfer or payment was made *on the eve of insolvency*, and (2) that insolvency ensued within three months of the date of the transaction. These are the two statutory tests now prescribed in lieu of an inquiry into the state of the debtor's mind whether the preferential payment was *in contemplation of bankruptcy*.

635. (2) Person preferred must be a creditor.—It is essential in order to constitute a fraudulent preference that the relation of debtor and creditor should have existed between the parties at the date of the transaction (p). A creditor within this section means a person who would be entitled to prove in the insolvency and share in the distribution of the insolvent's estate (q). The relation of a trustee who has misappropriated a trust fund and his cestui que trust is that of debtor and creditor. "Although there are other and peculiar elements in the relation between a cestui que trust and a trustee, undoubtedly the relation of debtor and creditor can and does exist" (r). A surety, though he has not paid the debt, is a "creditor," for he is entitled to prove in the debtor's insolvency (t).

Payment with a view of preferring a third person.—If a payment is made to a creditor not with the intention of preferring that creditor, but with the intention of benefiting another person who was not a creditor, the payment does not amount to a fraudulent preference. It

(p) *Miller v. Barlow* (1871) 14 M.I.A. 209, 232, 20 E.R. 765.

(q) *Re Paine* (1897) 1 Q.B. 122; *Re Blackpool Motor Car Co.* (1901) 1 Ch. 77.

(r) *Sharp v. Jackson* (1899) A.C. 419, 426.

(t) *Re Paine* (1897) 1 Q.B. 122; *Re Blackpool Motor Car Co.* (1901) 1 Ch. 77; *R. D. Sethna v. Kallianji* (1913) 15 Bom. L.R. 113, 19 I.C. 57; *Rodrigues v. Ramaswami* (1917) 40 Mad. 783, 38 I.C. 783.

was accordingly held under the Bankruptcy Act, 1883, that a payment made by the debtor to a creditor, not with the object of preferring that creditor, but with the object of benefiting the debtor's surety who had not been called on to pay and who had not paid the debt, was not a payment with a view to preferring that creditor, and that such payment was not void as against the trustee in bankruptcy (u); the surety, therefore, could not be ordered to pay over to the trustee in bankruptcy the amount so paid by the debtor (v). Though the general proposition stated above, namely, that a payment made with a view to prefer a third person is not a fraudulent preference, still holds good, the law as regards the particular case of sureties has been altered by the Bankruptcy Act, 1914, and sec. 44 of that Act expressly includes acts done with a view to preferring any creditor "or any surety or guarantor for the debt due to such creditor" (w). It is desirable to make a similar amendment in the corresponding sections of the Indian Acts.

The law has always been that if the debtor pays *directly* to his surety, the payment amounts to a fraudulent preference and the amount can be recovered from *him* by the trustee in bankruptcy (x).

A set-off before insolvency of debts for which there would have been a right of set-off under the Insolvency Acts (y), is not a fraudulent preference (z).

636. (3) There must have been a preference in fact.—Conditions (3) and (4) have been stated separately for clearness, for it has been decided that the mere fact that the payment does in fact prefer one creditor over others does not constitute it a fraudulent preference. It is also necessary to prove that the dominant motive with which the payment was made was "with a view" to prefer the creditor to whom the payment was made. See condition (4) below.

637. (4) View of preferring creditor.—*Test to be applied.*—In order to avoid a transaciton as a fraudulent preference it is not sufficient that the creditor was preferred; it is essential that the transfer or payment was made "with a view" to giving a preference to that creditor over the other creditors. The view to prefer must have been the dominant or substantial view; it is not necessary that it should have been the sole view (a). If the

- (u) *Re Mills* (1888) 58 L.T. 871; *Re Warren* (1900) 2 Q.B. 138.
- (v) *Re Warren* (1900) 2 Q.B. 138.
- (w) *Re G. Stanley & Co.* (1925) Ch. 148.
- (x) *Re Blackpool Motor Car Co.* (1901) 1 Ch. 77.
- (y) P.-t. I. A., s. 47; Prov. I. A., s. 46.
- (z) *Re Washington Diamond Mine Co.* (1893) 3 Ch. 95.
- (a) *Ex parte Griffith* (1883) 23 Ch. D. 69; *Ex parte Hill* (1883) 23 Ch. D. 695, 704-705; *New France and*

Garrard's Trustees v. Hunting (1897) 1 Q.B. 607, 616-617; *Re Lake* (1901) 1 Q. B. 710, 716; *Re Ramsay* (1913) 2 K.B. 80, 85; *Sime Darby & Co. v. Official Assignee* (1928) 30 Bom. L.R. 290, 107 I.C. 233, ('28) A.P.C. 77; *Official Assignee v. Mehta & Sons* (1919) 42 Mad. 510, 49 I.C. 968; *Angappa Chetti v. Nanjappa Row* (1908) 18 Mad. L.J. 189.

Paras.
637, 638

view to prefer was the sole view no difficulty arises. But it often happens that a debtor makes a payment or gives a security to a creditor from *mixed motives*. In that case the question whether there was a fraudulent preference will depend upon which object was *dominant* in his mind. If the dominant object or view was the giving the creditor a preference, the mere fact that besides that view there may have also been some view of benefiting himself, *e.g.*, staving-off insolvency, does not prevent the payment from being a fraudulent preference (b). On the other hand, if the dominant view in making the payment was to protect himself from exposure or from criminal proceedings, the fact that the view was in part to prefer the creditor paid over other creditors, will not make it a fraudulent preference; the dominant view in such a case is to protect the debtor himself, the view to prefer a particular creditor being merely a "secondary view" (c). "It is an exceedingly difficult thing to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act. But if we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea. It is a very difficult matter to prove that the dominant motive was the sole motive and I think the true test is this: (1) had the debtor a view of giving a preference to the creditor? and (2) was that the operative effectual view?" (d). "Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much" (e).

The fact that a debtor pays a particular creditor does not amount to a fraudulent preference, though he may at the time of payment have been in insolvent circumstances, not even if the *consequence* of his act has been to prefer that creditor over his other creditors. It must be shown not only that he has preferred the creditor, but that he has done so with the dominant view of giving him preference over the other creditors. That depends upon *the state of the debtor's mind*, and it is that which has to be explored. The question being one of the state of a man's mind, the rule that a person must be taken to have intended the natural consequences of his act, though true for other purposes, is not true for this purpose (f). Thus if a defaulting trustee on the eve of insolvency transfers his property to the beneficiary to make good the breaches of trust under an apprehension of a criminal prosecution, the transfer does not amount to a fraudulent preference, though the consequence is to give a preference to the beneficiary over the other creditors.

638. Burden of proof.—It had been held by the Judicial Committee of the Privy Council that the onus of proving that there has been a fraudulent preference lies on the Official Assignee or Receiver even if the debtor was insolvent at the time of the payment and knew himself to be

(b) *Ex parte Hill* (1883) 23 Ch. D. 695, 701; *Re Wingo and Davies* (1894) 1 Mans. 416.

(c) *Sharp v. Jackson* (1899) A.C. 419, 427; *Re Cohen* (1924) B. & C. R. 143, 159.

(d) Per Bowen, L.J., in *Ex parte Hill* (1883) 23 Ch. D. 695, 704-705.

(e) Per Halsbury, L.C., in *Sharp v. Jackson* (1899) A.C. 419, 421.

(f) *Sharp v. Jackson* (1899) A.C. 419, 423.

so (g). In an earlier case the Court of Appeal in England held that where a debtor in imminent expectation of insolvency voluntarily pays a particular creditor with the result of giving a preference in fact, and the reason for such payment is unexplained, a *prima facie* case of a dominant view of preferring that creditor and therefore of a fraudulent preference is established, and the payment will be set aside unless the party supporting the payment displaces the *prima facie* case (h). This decision does not seem to have met with the approval of the Judicial Committee, for it is not noticed by the Committee though it must have been aware of it. The conditions of the Privy Council ruling would be satisfied if the Official Assignee or Receiver, in addition to giving evidence of the debtor's insolvency, gives some evidence sufficient to make out a *prima facie* case of a view to prefer (h1).

Paras.
638, 639

Onus, however, as a determining factor of the whole case, can only arise if the Court finds the evidence pro and con so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. If, however, the Court after hearing and weighing the evidence comes to a definite conclusion, the need for placing the onus does not arise (i). In other words, the question of onus only becomes important if the circumstances are so ambiguous that a definite conclusion is impossible without resort to it (j).

639. Evidence of intent to prefer.—The question whether the dominant motive actuating the debtor in making a transfer or payment was a desire to prefer the particular creditor is one of fact. As the solution of this involves an inquiry into the state of a man's mind and as it is very seldom that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence (k). If the insolvent is a witness, either party may cross-examine him as to what he has previously said of the transaction (l). Evidence of acts of preference in favour of other creditors committed by the debtor shortly before or after the transaction impugned is admissible to show the debtor's intent (m). The deposition of the creditor to whom preference is given taken under sec. 36 of the Presidency-towns Insolvency Act (n) is admissible against him in a proceeding to set aside a transfer in his favour under this section (o).

- (g) *Sime Darby & Co. v. Official Assignee* (1928) 30 Bom. L. R. 290, 107 I. C. 233, ('28) A. P.C. 77; *Ex parte Lancaster* (1883) 25 Ch. D. 311; *Re Laurie* (1898) 5 Mans. 48; *P.M.A. Chettyar Firm v. N. A. Pillay* 86 I.O. 514, ('25) A. R. 201; *In the matter of L. W. Nasse* (1929) 7 Rang. 201, 118 I. C. 615, ('29) A. R. 229; *Kasi Iyer v. Official Receiver* ('29) A. M. 821.

- (h) *Re Cohen* (1924) 2 Ch. 515; *Gandabhai v. Balkrishna* (1930) 32 Bom. L.R. 294; *Krishna Das v. Raja Ram* (1930) 28 All L. J. 370, ('30) A. A. 282.

- (h1) See *Re Hoyle* (1924) B. & C. R. 22.
(i) *Robins v. National Trust Co.* (1927) A. C. 515, 520.

- (j) *Sime Darby & Co. v. Official Assignee* (1928) 30 Bom. L.R. 290, 291, 107 I.C. 233, ('28) A.P.C. 77.

- (k) *Sime Darby & Co. v. Official Assignee* (1928) 30 Bom. L. R. 290, 107 I.C. 233, ('28) A.P.C. 77.

- (l) *Re Cohen* (1924) B. & C.R. 143.

- (m) *Re Ramsay* (1913) 2 K.B. 80.

- (n) *Prov. I. A.*, s. 59A.

- (o) *Madhoram Raghunull v. Official Assignee* (1923) 27 C. W. N. 61, 85 I.C. 984, ('23) A.C. 631.

Paras.
640, 641

640. Good faith of preferred creditor immaterial.—(1) Under the law prior to the Bankruptcy Act, 1869, the debtor's intention alone was material; good faith on the part of the creditor was entirely immaterial.

(2) Under the Bankruptcy Act, 1869, it was held that even if a transaction was void as a fraudulent preference, it could be upheld by a creditor if he acted "in good faith," that is, without knowledge of the debtor's insolvency and of the debtor's intent to prefer him (p). This was because sec. 92 of the Bankruptcy Act, 1869, contained a saving clause at its end in the following terms: "But this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration".

(3) The saving clause at the end of sec. 92 was omitted in sec. 48 of the Bankruptcy Act, 1883, and it does not occur in the present Bankruptcy Act, 1914. Nor does it occur either in sec. 56 of the Presidency-towns Insolvency Act or in sec. 54 of the Provincial Insolvency Act. The result is to restore the law as it was before the passing of the Bankruptcy Act, 1869. This may be explained by an illustration. A sells goods to B on credit, the price being payable on a later date. Ten days before that date, B, who is then on the eve of insolvency, pays the price of the goods to A *with intent to preferring A over his other creditors*. A receives payment without knowledge of B's insolvent condition and of B's intent to prefer him over the other creditors. Under the Bankruptcy Act, 1869, A being a payee in good faith and for valuable consideration, the consideration being the price of the goods, would be protected, and the transaction would not be void as a fraudulent preference (q). Under the present law, both English and Indian, the fact that A had no knowledge of the insolvency of B or of B's intent to prefer him, does not protect him, and A is liable to repay the money received by him to the Official Assignee or Receiver in order that the other creditors may share in that money. The fact that A received payment in good faith is entirely immaterial (r).

(4) Sub-sec. (2) of the present section protects persons making title in good faith and for valuable consideration *through or under a preferred creditor*. The *preferred creditor himself* does not come within the exception as he did under the Bankruptcy Act, 1869. See para. 649 below.

641. Pressure.—Before the passing of the Bankruptcy Act, 1869, it was essential in order to constitute a fraudulent preference that it should have been a voluntary act, and not an act under pressure. The Act of 1869 did not alter the law in that respect (s), and the law is the same now. The

(p) *Butcher v. Stead* (1875) L.R. 7 H.L. 839.

(q) *Butcher v. Stead* (1877) L.R. 7 H.L. 839.

(r) *Re Cohen* (1924) B. & C.R. 143, 149; *Re Naraindas Sunderdas* 93 I. C. 331, ('26) A.S. 133; *Official Receiver v. Lachmibai* 92 I.C. 5,

('26) A.S. 140; *Mamayya v. Official Receiver* 92 I.C. 729, ('26) A.M. 338.

(s) *Butcher v. Stead* (1875) L.R. 7 H.L. 839, 849; *Sharp v. Jackson* (1899) A.C. 419, 423; *Labha Ram v. Puran Chand* (1919) Punj. Rec. No. 130, p. 336, 53 I. C. 421.

word "preference" in this section implies an act of free will. An act done under pressure is not an act of free will (*t*). The pressure may proceed from a creditor or even from a surety for the debtor (*u*). Para. 641.

A payment made, or a security given, by a debtor on the eve of insolvency on the demand of a creditor is not a fraudulent preference, even if the demand is not accompanied with a threat of legal proceedings (*v*), or there is no immediate power of taking such proceedings (*w*). Also it has been held that payment of a debt not yet due is not a fraudulent preference, if made upon a demand of the creditor (*x*). The payment in these cases is made under pressure, and the pressure negatives preference. But the pressure which the creditor must prove must be real and effective. It must be *bona fide* and not colourable. It must have actually operated on the debtor's mind and the transaction must have been entered into by reason of it (*y*). There have been cases in which it was held that however desperate the circumstances of the debtor might be, and although the creditor knew them to be desperate, the creditor was not debarred from pressing his debtor for payment, and if he did so press, and payment was made, such payment was not a fraudulent preference (*z*). But the tendency in later cases has been to hold that demand or pressure, where the creditor knew that the debtor was hopelessly insolvent, cannot be real, for it cannot really influence him to make the payment so as to negative preference of the creditor being the dominant view of the debtor (*a*). It has accordingly been held that if a debtor informs his creditor that he is about to become bankrupt or that he will stop payment in a week, and thereupon the creditor threatens him with an action, and the debtor makes a payment to the creditor, the payment is a fraudulent preference, for pressure under such circumstances could have no real effect (*b*). Even if the debtor is in some degree influenced by a demand for payment, so that the payment would not have been made but for the demand and pressure, yet if the view to giving preference be the dominant view, the payment will be set aside as a fraudulent preference (*c*).

- (*t*) *Butcher v. Stead* (1875) L.R. 7 H. L. 839, 846; *Sharp v. Jackson* (1899) A.C. 419, 427; *Kasi Iyer v. Official Receiver* (1899) A.M. 821.
- (*u*) *Edwards v. Glyn* (1859) 28 L. J. Q. B. 350.
- (*v*) *Smith v. Payne* (1795) 6 T.R. 152, 101 E.R. 484; *Ex parte Boyle* (1871) 25 L. T. 550; *Tomkins v. Saffery* (1877) 3 App. Cas. 213, 235.
- (*w*) *Van Casteel v. Booker* (1848) 2 Ex. 691, 154 E.R. 668.
- (*x*) *Strachan v. Barton* (1856) 11 Ex. 647; *Thompson v. Freeman* (1876) 1 T.R. 155, 99 E.R. 1026.
- (*y*) *Ex parte Hall* (1882) 19 Ch. D. 580;

- Re Boyd* (1889) 6 Morr. 209; *Re Hoyle* (1924) B. & C.R. 22.
- (*z*) *Ex parte Blackburn* (1871) 712 Eq. 358; *Ex parte Tempest* (1871) L. R. 6 Ch. App. 70; *Ex parte Topham* (1873) L. R. 8 Ch. App. 614, 620; *Smith v. Pilgrim* (1876) 2 Ch. D. 127, 134; *Dadapa v. Vishnudas* (1888) 12 Bom. 424, 426.
- (*a*) *Ex parte Wheatley* (1881) 45 L.T. 80; *Ex parte Hall* (1882) 19 Ch. D. 580; *Ex parte Palmer* (1882) W. N. 130.
- (*b*) *Ex parte Hall* (1882) 19 Ch. D. 580.
- (*c*) *Re Bell* (1892) 10 Morr. 15; *Ex parte Griffith* (1883) 23 Ch. D. 69.

Paras.
642, 643

642. Threat of legal proceedings.—A transfer or payment made under a threat of legal proceedings, whether civil or criminal, does not amount to fraudulent preference (e), even though there is no immediate power of rendering the threat available by taking legal steps (f). Similarly a transfer or payment made under an apprehension of legal proceedings, even though there has been no threat, or demand or pressure from the creditor, does not amount to a fraudulent preference. Thus where a trustee who has committed breaches of trust and who is in insolvent circumstances, on the eve of his insolvency transfers his property to his co-trustee or to the beneficiary to make good the breaches of trust, though without any demand or request by them, and his main object in so doing is to shield himself from the consequences of his breaches, the transfer does not amount to a fraudulent preference (g). Also it has been held that a transfer or payment made even under a mistaken apprehension of legal proceedings does not amount to a fraudulent preference (h).

643. View of benefiting debtor himself.—If the dominant view is to benefit the debtor himself, the fact that a particular creditor is preferred in the sense of obtaining a benefit not shared by others, will not constitute the transaction a fraudulent preference. Thus where a fortnight before the debtor presented his petition in bankruptcy, his solicitor lent him £200 on the security of a bill of sale, and at the time he handed the debtor a cheque for that amount he presented him with his bill of costs amounting to £87, and the debtor paid it out of the money advanced, it was held that the transaction did not amount to a fraudulent preference; the debtor paid the bill under the apprehension that unless he did so he would not get the £200 (i). Similarly, where the debtor gave to his solicitor who had acted for him in previous litigation a charge on his house for costs amounting to £900, the solicitor at the same time agreeing to obtain for the debtor an advance of £250 on such charge, it was held that the main object of the debtor was to benefit himself by getting £250 and not to benefit the solicitor, and that the transaction was not a fraudulent preference (j). Where a creditor having a claim of Rs. 18,000 against the debtor pressed for security, but the debtor at first refused to give any, and eventually agreed to give security only if the creditor advanced a further sum of Rs. 7,000 to enable him to meet certain hundies, and the creditor paid the amount and got the security, it was held that the dominant motive was to benefit the debtor himself, and that consequently the transaction was not a fraudulent

- (e) *Ex parte Taylor* (1886) 18 Q.B.D. 295; *Nripendra Nath v. Ashutose Ghose* (1915) 20 C.W.N. 420, 33 I. C. 548.
(f) *Vancasteel v. Booker* (1848) 2 Ex. 641, 154 E. R. 668.
(g) *Sharp v. Jackson* (1899) A.C. 419.
(h) *Thompson v. Freeman* (1786) 1 T.R.

- 155, 99 E.R. 1026.
(i) *Ex parte Boyle* (1871) 25 L. T. 550.
See also *Mansookhlal Dolatchand & Co. v. Nagardass Moolchand* (1928) 6 Rang. 536, 117 I. C. 569, (28) A. R. 302.
(j) *Re Arnott* (1889) 6 Morr. 215.

preference (*k*). Where a trader knowing very likely that he will stop payment next week, makes a payment in the hope, however desperate, that if he were able to keep himself commercially alive something might turn up in his favour, the payment is not a fraudulent preference (*l*).

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A person holding a decree against his debtor is entitled to execute it at any time. If instead of executing the decree immediately, he agrees to wait in consideration of a security being given to him for the judgment-debt, the transaction is not a fraudulent preference, for the dominant view of the debtor is to benefit himself. There is hardly any benefit to the decree-holder, for he could have realised the amount of the decree by immediate attachment and sale of the debtor's property (*m*).

644. Other circumstances negating intent to prefer.—Where a debtor makes a payment not with the dominant view of preferring a creditor, but in the belief, on reasonable grounds, that he is under a legal obligation to pay, the payment is not a fraudulent preference; in other words, where the dominant motive actuating the debtor is that in making a payment or transfer he was only doing what he felt himself bound or compelled to do, the case is not one of fraudulent preference (*n*). It will, however, be a fraudulent preference if the debtor was moved by a nice sense of honour, or a sense of duty or of moral obligation (*o*). Similarly where a payment or transfer is made, not with the dominant view of preferring a creditor, but to save the debtor from exposure, or a criminal prosecution (*p*), even though there has been no threat (*q*), or to revive an undisputed debt so that it may not be time-barred (*r*), or to make reparation for a past wrong such as a breach of trust (*s*), or to fulfill a prior agreement (*t*), the payment or transfer is not a fraudulent preference. Payments made in the ordinary course of business, and not with a view to prefer, are good (*u*), but not payments or transactions which are out of the ordinary course of business (*v*). The replacement by the debtor on the eve of insolvency of money advanced for a specific purpose which fails, as for the purpose of settling with the

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| <p>(<i>k</i>) <i>Racburn & Co. v. Zoollkofer & Co.</i> (1924) 2 Rang. 193, 83 I.C. 440, ('24) A.R. 308; <i>Daulat Ram v. Deoki Nandan</i> 75 I.C. 861, ('24) A. L. 686; <i>Bhagwan Das & Co. v. Chuttan Lal</i> (1921) 43 All. 427, 62 I. C. 732, ('21) A. A. 41.</p> <p>(<i>l</i>) <i>Tomkins v. Saffery</i> (1877) 3 App. Cas. 213, 235; <i>Official Assignee v. M.P.A.K. Chettyar Firm</i> (1927) 5 Rang. 229, 103 I.C. 174, ('27) A. R. 190; <i>Official Receiver, Tinnevely v. Nallaperumal</i> ('29) A. M. 471; <i>Mela Ram v. Ghulam Dastgir</i> (1929) 114 I. C. 709, ('29) A. L. 159.</p> <p>(<i>m</i>) <i>Re Wilkinson</i> (1884) 1 Morr. 65; <i>Re Glanville</i> (1885) 2 Morr. 71.</p> <p>(<i>n</i>) <i>Re Vautin</i> (1900) 2 Q. B. 235; <i>Sime Darby & Co. v. Official Assignee</i> (1928) 30 Bom. L. R. 290, 107 I. C. 233, ('28) A. PC. 77.</p> <p>(<i>o</i>) <i>Re Fletcher</i> (1891) 9 Morr. 8; <i>Re</i></p> | <p><i>Vingoe</i> (1894) 1 Mans. 416; <i>Re Blackburn & Co.</i> (1899) 2 Ch. 725 [company in winding up].</p> <p>(<i>p</i>) <i>Ex parte Taylor</i> (1887) 18 Q.B.D. 295; <i>Puran Chand v. Puran Chand</i> ('23) A.L. 652, 75 I. C. 441.</p> <p>(<i>q</i>) <i>Sharp v. Jackson</i> (1899) A.C. 419.</p> <p>(<i>r</i>) <i>Ex parte Gaze</i> (1889) 23 Q.B.D. 74.</p> <p>(<i>s</i>) <i>Ex parte Taylor</i> (1887) 18 Q.B.D. 295; <i>Re Lake</i> (1901) 1 Q.B. 710.</p> <p>(<i>t</i>) <i>Ex parte Kevan</i> (1874) L.R. 9 Ch. App. 752; <i>Ex parte Hodgkin</i> (1875) L.R. 20 Eq. 746; <i>Bills v. Smith</i> (1865) 34 L. J. Q.B. 68; <i>Nripendra Nath v. Ashutose Ghosh</i> (1915) 20 C.W.N. 420, 33 I.C. 548.</p> <p>(<i>u</i>) <i>Tomkins v. Saffery</i> (1877) 3 App. Cas. 213, 235; <i>Re Clay</i> (1896) 3 Mans. 31.</p> <p>(<i>v</i>) <i>Re Eaton</i> (1897) 2 Q.B. 16; <i>Miller v. Sheo Pershad</i> (1883) 10 I.A. 98, 110, 6 All. 84, 94.</p> |
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creditors, is not a fraudulent preference. Such money in fact does not form part of the insolvent's assets (*w*).

The abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one creditor to others after a debt has been incurred (*x*). Payment of the mortgage-debt to a mortgagee cannot be a fraudulent preference (*y*). A lease by a debtor on the eve of insolvency at a fair rent is not a fraudulent preference (*z*).

If a debtor makes a payment to a creditor or gives security, after being arrested under the terms of sec. 34 (2) of the Presidency-towns Insolvency Act, the fact that he has been arrested does not necessarily prevent the transaction from being a fraudulent preference; the question whether it is a fraudulent preference is to be determined by the provisions of the fraudulent preference section.

645. Agent.—Where a payment alleged to be a fraudulent preference is made to an agent of the creditor, and the agent, without knowledge of the debtor's intent to prefer, pays the money to his principal, he cannot be compelled to refund it to the Official Assignee or Receiver (*a*).

646. (5) Adjudication must have been on a petition presented within three months.—The last condition is that the debtor must be adjudged insolvent on a petition presented within three calendar months (*b*) after the date of the transaction impugned (*c*). In calculating this period the day on which the petition was presented is to be excluded (*d*). If no petition is presented within three months after the date of the transaction, the transaction stands good, and it cannot be impeached by the Official Assignee or Receiver. The transaction, though called fraudulent, is fraudulent only in the eye of the bankruptcy law (*e*). If three months elapse without any petition being presented, the transaction cannot be avoided under the bankruptcy law (*f*). Nor can it be avoided under the common law, for there is nothing at common law to prevent a debtor from preferring one creditor to another. Nor can it be impeached under sec. 53 of the Transfer of Property Act, 1882, a section which is based on 13 Eliz., c. 5, now the Law of Property Act, 1925, sec. 172. These sections provide for the avoidance of transfers made with intent to defeat or delay creditors, and it has been held that a transfer of property is not made with intent to defeat or delay

(*w*) *Tovey v. Milne* (1819) 2 B. & Ald. 683, 106 E.R. 514.

(*x*) *Miller v. Barlow* (1871) 14 M.I.A. 209, 20 E.R. 208.

(*y*) *Jadu Nath v. Manindra Nath* (1923) 27 C.W.N. 816, 80 I.C. 323, ('23) A.C. 689.

(*z*) *Desraj v. Sagar Mal* (1916) 38 All. 37, 31 I.C. 716.

(*a*) *Re Morant* (1924) 130 L. T. 398.

(*b*) General Clauses Act, 1897, s. 3 (33).

(*c*) *Sohan Lal v. Sheo Nath* (1928) 26 All. L. J. 941, 111 I. C. 136.

(*d*) *Re Dawes* (1897) 4 Mans. 117; *Re Harvey* (1890) 7 Morr. 138.

(*e*) See para. 631 above.

(*f*) *Ex parte Games* (1879) 12 Ch. D. 314.

creditors within the meaning of the Statute of Elizabeth (g) or of sec. 53 of the Transfer of Property Act, 1882 (h), because its effect or object is to prefer one creditor to another. The transfer may be of *all* the grantor's property for the benefit of a particular creditor or of particular creditors. If the deed is *bona fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth (i). The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor (j). What the statute invalidates is a transfer which removes the whole, or a part, of the debtor's property from the creditors as a body, to the benefit of the debtor (k). It may be added that if the primary intention be to defeat or delay the creditors as a body, the fact that a particular creditor was incidentally preferred will not take the case out of the statute 13 Elizabeth, c. 5, or of sec. 53 of the Transfer of Property Act, 1882 (l).

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A transfer by way of fraudulent preference is an act of insolvency, and, like all other acts of insolvency, it is only available for adjudication for three months (m). If three months from the execution of the transfer elapse without any insolvency petition being presented, it cannot afterwards be impeached as an act of insolvency available for a petition. Nor can it be impeached in any other way under the bankruptcy law (n).

The rules stated above may be explained by an illustration. A debtor with a view to preferring a creditor delivers certain goods to him on 17th September 1929. A further delivery of goods is made on 22nd September 1929. On 22nd December 1929, a petition is presented against the debtor and he is afterwards adjudged insolvent. The Official Assignee applies to have both the transactions set aside as being void against him. The delivery of goods on 17th September, being outside the limit of three months necessary to make the transfer with respect to it a fraudulent preference, is good against the Official Assignee, and cannot be impeached by him, but the delivery of goods on 22nd September being within the three months, is void against the Official Assignee and he is entitled to those goods or the value thereof (o).

646A. Fraudulent preference is voidable, not void.—A fraudulent preference is not absolutely void; it is only voidable. This follows

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| <p>(g) <i>Alton v. Harrison</i> (1869) L.R. 4 Ch. App. 622; <i>Middleton v. Pollock</i> (1875) 2 Ch. D. 104; <i>Re Lloyd's Furniture Palace, Ltd.</i> (1925) Ch. 853.</p> <p>(h) <i>Musahar Sahu v. Hakim Lal</i> (1910) 43 I.A. 104, 43 Cal. 521, 32 I.C. 343.</p> <p>(i) <i>Alton v. Harrison</i> (1869) L.R. 4 Ch. App. 622, 626.</p> <p>(j) (1875) 2 Ch. D. 104, 108-109, <i>supra</i>.</p> | <p>(k) (1916) 43 I.A. 104, 107, 32 I.C. 343, <i>supra</i>.</p> <p>(l) <i>Re Fusey</i> (1923) B. & C. R. 8, (1923) 2 Ch. 1.</p> <p>(m) P.-t. I. A., s. 12 (1) (c); Prov. I. A., s. 9 (1) (c).</p> <p>(n) <i>Ex parte Games</i> (1870) 12 Ch. D. 314; <i>Allen v. Bonnell</i> (1870) L.R. 5 Ch. App. 577.</p> <p>(o) <i>Re Harvey</i> (1890) 7 Morr. 138.</p> |
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Paras. 646A-647A from sub-sec. (2) by which it is provided that the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent shall not be affected by the avoidance of a transaction as a fraudulent preference (p).

There are certain transactions entered into by a debtor prior to his insolvency, which though valid between the debtor and his creditor, may be impeached by the Official Assignee or Receiver. These are really exceptions to the general rule that the Official Assignee or Receiver takes the property of the insolvent subject to the same equities as those to which it was subject in the hands of the insolvent. The right of action in such cases vests in the Official Assignee or Receiver by virtue of a title superior to that of the insolvent conferred upon him by the Insolvency Acts. Fraudulent preference is one of those exceptions, and though the debtor himself cannot recover money or property transferred by way of fraudulent preference, the Official Assignee or Receiver has the right to do so. "When a man commits a fraudulent preference he pays to the creditor a sum he admits to be justly due to the creditor. If no bankruptcy takes place he cannot recover that money from the creditor simply on the ground that he contemplated bankruptcy and intended to prefer the creditor. At the time the payment is made it is a good payment, and it is only when bankruptcy ensues within a certain time that it can be set aside. At the time he receives it the creditor may do what he likes with the money. He may pay it into his own account or may otherwise deal with it as he pleases, and it is impossible to say that he becomes a trustee at that moment for a person who may not even come into existence, viz., the trustee in bankruptcy. If he does not become a trustee, the proper order to make is a simple order to pay the money back, and no question of fiduciary capacity arises" (q).

647. Proof by creditor fraudulently preferred.—A creditor who pays back to the Official Assignee or Receiver money received by him from the insolvent by way of fraudulent preference is entitled to prove for his debt with the other creditors. (r).

647A. Application by whom to be made.—Sec. 54A of the Provincial Insolvency Act provides that a petition for the annulment of any transfer, payment, etc., on the ground that it is a preference, may be made by the Receiver, or, with the leave of the Insolvency Court, by any creditor who has proved his debt and who satisfies the Court that the Receiver has been requested and refused to make such petition. This section was inserted

(p) P.-t. I. A., s. 56 (2); Prov. I. A., s. 54 (2).
(q) *Re Bishop* (1891) 8 Morr. 221, 225;
Marks v. Feldman (1870) L.R. 5 Q.B. 275, 279.

(r) *Re Stephenson* (1888) 20 Q.B.D. 540;
Devi Dial v. Sundar Das (1919)
Punj. Rec. No. 65, p. 63, 51 I. C. 720.

by Act 39 of 1926, and it gives effect to some of the earlier decisions on the subject (s).

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647A-649

The practice is not uniform in cases governed by the Presidency-towns Insolvency Act. In Calcutta, the application may be made by the Official Assignee, or, with the leave of the Court, by a creditor who has proved his debt and who satisfies the Court that the Official Assignee has refused to make the application (t). Similar practice prevails in Bombay. In Rangoon it has been held that a creditor has no *locus standi* to apply even with the leave of the Court, and that if the Official Assignee refuses to take action, the creditor's only remedy is to appeal from the decision of the Official Assignee under sec. 86 of the Act (u). The Rangoon view does not seem to be correct.

648. Preference not avoided for benefit of particular creditor.—

Where the result of recovering property alleged to have been delivered to a creditor by way of fraudulent preference would not be for the benefit of the creditors at large, but of an individual creditor who claims a security on it, the Official Assignee or Receiver ought not to take proceedings for the recovery of the property himself, nor will the individual creditor be allowed to take them in his name (v).

649. Position of third persons making title in good faith.—

A transaction which would be void as a fraudulent preference as between a creditor and the Official Assignee or Receiver can be upheld by any person making title in good faith and for valuable consideration through or under that creditor (w). Once a fraudulent preference has been established, the onus of proving that the persons claiming through or under the preferred creditor acted in good faith and for value lies on such person (x). The words "in good faith" mean without notice of any intention on the part of the debtor to give fraudulent preference to the creditor. The words "for valuable consideration" include a pre-existing debt (y). Depositions of a person claiming through a creditor made under sec. 36 of the Presidency-towns Insolvency Act (z) are admissible against him on the question of good faith in a proceeding to set aside the transfer to him (a).

(s) See *Ananthanarayana Ayyar v. San-karanarayana Ayyar* (1924) 47 Mad. 673, 79 I.C. 395, ('24) A.M. 345.

(t) *Re Surajmull Mungchand* (1921) 26 C.W.N. 803, 70 I.C. 463, ('21) A.C. 403.

(u) *In the matter of the estate of P. A. Mohmed Ganny* (1927) 5 Rang. 375, 104 I.C. 89, ('27) A. R. 284.

(v) *Ex parte Cooper* (1875) L.R. 10 Ch. App. 510. See also *Ram Sarup v. Jagat Ram* (1921) 2 Lah. 102, 59 I. C. 977, ('21) A. L. 200.

(w) P.-t. I. A., s. 56 (2); Prov. I. A., s. 54 (2). See *Stevenson v. Newsham* (1853) 13 C.B. 285.

(x) *Sime Darby & Co. v. Official Assignee* (1928) 30 Bom. L. R. 290, 107 I.C. 233, ('28) A. P.C. 77.

(y) *Butcher v. Stead* (1875) L.R. 7 H.L. 839, a case under the B.A., 1860, s. 92.

(z) Prov. I. A., s. 59 A.

(a) *Madhoram v. The Official Assignee* (1923) 27 C.W.N. 611, 85 I.C. 984, ('23) A.C. 631. See Prov. I. A., s. 59A.

Paras.
650 651

650. Limitation.—Art. 181 of the Indian Limitation Act, 1908, does not apply to an application under this section. The application may be made at any time during the pendency of the insolvency proceedings (b).

651. Payments made after presentation of insolvency petition.—This section does not apply to a payment to a creditor by way of fraudulent preference made after the presentation of an insolvency petition. Such a payment, however, may be avoided as being contrary to the policy of the bankruptcy laws. It is not protected by sec. 57 of the Presidency-towns Insolvency Act (c) [Provincial Insolvency Act, sec. 55].

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- (b) *Pirithi Nath v. Basheshar Nath* 69
I.C. 403, ('24) A.L. 331.
(c) *Re Badham* (1893) 10 Morr. 252;

(1893) 69 L. T. 356; *Re Dunkley & Sons* (1905) 2 K. B. 683.

PART VI.

PROTECTION OF BONA FIDE TRANSACTIONS.

[P.-t. I. A., s. 57 ; Prov. I. A., 1920, s. 55 ; Prov. I. A., 1907, s. 38.]

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652, 653

652. Protected transactions.—Subject to the provisions of the Insolvency Acts as to executions (a), voluntary transfers (b), and fraudulent preferences (c), nothing in the Acts invalidates in the case of an insolvency—

- (a) any payment of money by an insolvent to a creditor ;
- (b) any payment of money or delivery of property to the insolvent ;
- (c) any transfer by the insolvent for valuable consideration ; or
- (d) any contract or dealing by or with the insolvent for valuable consideration :

Provided that both the following conditions are complied with, namely—

- (1) that any such transaction takes place before the date of the order of adjudication ; and
- (2) that the person who deals with the debtor has not at the time of any such transaction notice of the presentation of any insolvency petition by or against the debtor.

653. The transaction must be bona fide.—(1) *Transactions contrary to bankruptcy law.*—A transaction which is contrary to the policy of the bankruptcy laws is not protected by this section.

The protection accorded by this section extends only to *bona fide* transactions (d). The *bona fides* of a transaction depends on the circumstances of each case, and it is difficult to lay down any general rule on the subject beyond this that the transaction must be a fair and honest one (e).

Sec. 133 of the Bankruptcy Act, 1849, contained the words “bona fide”. Secs. 94 and 95 (1) of the Bankruptcy Act, 1869, contained the words “in good faith”. Neither of those expressions was reproduced in sec. 49 of the Bankruptcy Act, 1883, but the marginal-note to that section (which, however, is not part of the Act) contained the words “bona fide” (f). The section in both the Indian Acts is based to a large extent on sec. 49 of the Bankruptcy Act, 1883, and the words “*bona fide*” appear in the marginal-note. Though neither the English nor the Indian section expressly requires that transactions with the insolvent should, in order to be protected, be in good faith, it has been held that good faith is still essential, and if a transaction is not *bona fide* it may be avoided as contrary to the policy of the bankruptcy laws. It has thus been held that a payment to a creditor after a petition for adjudication has been presented, which would have been a fraudulent preference if made before the presentation, is contrary to bankruptcy laws and in bad faith, though it was made before the receiving order and though the creditor had no

(a) P.-t. I. A., ss. 53-54 ; Prov. I. A., ss. 51-52.

(b) P.-t. I. A., s. 55 ; Prov. I. A., s. 53.

(c) P.-t. I. A., s. 56 ; Prov. I. A., s. 54.

(d) *Re Badham* (1893) 10 Morr. 252, (1893) 69 L. T. 256.

(e) *Davas v. Venables* (1837) 3 Bing. N. C. 403, 132 E. R. 404.

(f) The marginal-note to s. 45 of the B. A., 1914, is the same as that in s. 49 of the B. A., 1883.

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notice of an act of bankruptcy, and that it was not protected by sec. 49 of the Bankruptcy Act, 1883. The payment having been made after the presentation of the petition, that is, after the title of the trustee had commenced, the money was the property of the trustee and the creditor must pay it back to him (g).

(2) *Transaction in itself an act of insolvency*.—A transaction which comes within this section is protected, although it is in itself an act of insolvency, provided that the party other than the insolvent acts in good faith; but it is otherwise if he acts in bad faith and is a party to the fraud on bankruptcy laws. Thus if a person sells his property with intent to defeat or defraud his creditors, as where he intends to abscond with the purchase money, it is an act of insolvency, but the buyer will be protected if he has no knowledge of or ground to suspect such intention (h). A creditor, however, who takes a transfer of substantially the whole of his debtor's property in payment wholly of a past debt, knowing that there are other creditors, is not protected. Such a transaction is an act of insolvency, and the creditor being a party to it, is a party to a fraud on bankruptcy laws (i). Similarly where a creditor takes an assignment from the debtor for the purpose of paying himself and other creditors named in a list in full, believing that they are all the creditors, but the list turns out to be incomplete, the transaction, though entered into honestly, is nevertheless an act of insolvency as necessarily tending to defeat creditors omitted from the list, and to substitute for the administration in insolvency a different mode of administration, and is not protected. Had the parties investigated the facts and adverted to the legal effect thereof, they would have known that the transaction would constitute an act of insolvency (j). In *Re Slobodinsky* (k), where the transfer was in itself an act of insolvency, Wright, J., said that although the words "in good faith" did not occur in sec. 49 of the Bankruptcy Act, 1883, the omission was not intended to make any difference and that a person who takes a conveyance of a debtor's property cannot claim the benefit of that section if he had notice of anything wrong or anything that really put him upon inquiry. In that case the bankrupt had transferred all his assets and business to a company formed by himself and his nominees. The transaction was an act of bankruptcy as having been made to defraud creditors, and the company was held fixed with notice of the fraud. The principle of the English decisions referred to above is that a person cannot claim the protection of this section, if he engages himself in an act which he knows or ought to have known is in itself an act of bankruptcy.

654. Dealings by insolvent in respect of his property.—Dealings by a debtor in respect of his property fall into three classes, namely,—

(1) dealings before the commencement of the insolvency [para. 655] ;

(g) *Re Badham* (1893) 10 Morr. 252, 89 L. T. 356; *Re Slobodinsky* (1903) 2 K. B. 517, 525; *Re Dunkley & Son* (1905) 2 K. B. 683, where the payment was held to have been made in good faith and to be protected.

(h) *Shears v. Goddard* (1896) 1 Q. B. 406; *Re Dunkley & Son* (1905) 2 K. B. 683.

(i) *Re Jukes* (1902) 2 K. B. 58.

(j) *Re Sharp* (1900) 83 L. T. 416.

(k) (1903) 2 K. B. 517, 525.

- (2) dealings between the commencement of the insolvency and the date of the order of adjudication [para. 656] ; and
- (3) dealings after the order of adjudication [para. 668].

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This section relates to transactions of the second class.

655. (1) Transactions before commencement of insolvency.—

With the exception of certain transfers mentioned in secs. 55 and 56 of the Presidency-towns Insolvency Act (1), no transfer of property made by a debtor before the commencement of his insolvency can be impeached under the bankruptcy law. This subject has been discussed in paragraphs 583 and 584 above.

656. (2) Transactions between commencement of insolvency and date of order of adjudication :—

(1) *Exception to the doctrine of relation back.*—We now turn to the transactions of the second class to which this section relates. By reason of the doctrine of relation back the property of the insolvent on the making of the order of adjudication vests in the Official Assignee or Receiver from the commencement of the insolvency (para. 582). The insolvent not only ceases to be the owner, but is regarded as not having been the owner from the commencement of the insolvency. From the moment of the commencement of the insolvency he is deprived of all powers to enter into transactions which will bind the Official Assignee or Receiver in respect of his property. These would include payments by the insolvent to any of his creditors, payments to the insolvent by persons indebted to him, delivery of goods to the insolvent by persons who were under an obligation to deliver them to him, transfers by the insolvent for valuable consideration, and contracts or dealings by or with the insolvent for valuable consideration, *however bona fide they might be*. In fact, none of these transactions was excluded from the operation of the doctrine of relation back when the doctrine was first introduced in England [para. 581]. The strict application of the doctrine resulted in great injustice to persons dealing *bona fide* with the bankrupt and without notice of an act of bankruptcy, and it soon became necessary to introduce an exception to the doctrine to protect certain *bona fide* transactions. This led to the enactment of what is known in England as “the protection clause” upon which the present Indian section is based. The Indian section is referred to throughout these lectures as “the protection section.”

(2) *English law.*—The first material enactment which aimed at saving *bona fide* transactions was contained in sec. 81 of the statute 6 Geo. 4, c. 16. This was followed by other enactments, and the law on the subject took a definite shape in sec. 49 of the Bankruptcy Act, 1883 (now sec. 45 of the Bankruptcy Act, 1914) on which the section in both the Indian Acts is to a large extent based. In England, as the law now stands, certain transactions are protected

(1) Prov. I. A., ss. 53, 54.

Para. 656 if certain conditions are complied with. The transactions are the same as those mentioned in the Indian section [para. 652], but the conditions are—

- (1) that the transaction takes place “before the date of the *receiving order*” (m); and
- (2) that the person who deals with the debtor has not at the time “notice of *any available act of bankruptcy* (n) committed by the bankrupt.”

Before considering these conditions it may be observed that as to payment of money or delivery of property to the bankrupt, it is now provided by the Bankruptcy Act, 1914, sec. 46, that such payment or delivery shall be a complete discharge to the person paying the money or delivering the property, if the payment or delivery is made before the date of the receiving order *in the ordinary course of business or otherwise bona fide and without notice of the presentation of a bankruptcy petition* even though with notice of an available act of bankruptcy. This does not apply to any payment or delivery *by* the bankrupt. It is not necessary for our present purposes to consider this modification of the English Law.

Turning now to the two conditions in the English section, it will be seen that the first condition is substantially the same as that in the Indian section, but the second is substantially different.

The position under the English law is that transactions entered into with a bankrupt between the commencement of the bankruptcy and the date of the receiving order are protected, if (a) the person who deals with the bankrupt had no notice at the time of *any available act of bankruptcy*, and (b) they are *bona fide* (o). The effect of an act of bankruptcy in England is to prevent all persons *who have notice that an available act of bankruptcy has been committed* from entering with the debtor into transactions which will be binding as against the trustee in bankruptcy.

The legal position of a man who commits an act of bankruptcy under the English law is thus stated by Fletcher Moulton, L.J., in *Ponsford Baker & Co. v. Union of London and Smith's Bank, Ltd.* (p) :—

“Nothing is more firmly established in bankruptcy law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it in if it is not already in his hands or to make payments to his creditors out of that which he has actually at

(m) There is nothing like a receiving order in India. In England a receiving order precedes adjudication. See para. 182.

(n) “Available act of bankruptcy” means any act of bankruptcy “available” for a bankruptcy petition at the date of the presentation of the petition on

which the receiving order is made B. A., 1914, s. 167. An act of bankruptcy is so available if it has occurred within three months before the presentation of the petition : B. A., s. 4 (1) (c).

(o) See para. 653.

(p) (1906) 2 Ch. 444, 452.

his command. He can give no good discharge to a debtor who pays him **Para. 656**
with notice of an act of bankruptcy, because the debt may by subsequent
 bankruptcy proceedings be turned into a debt due to his trustee, and not to
 himself. This is a principal and fundamental part of our bankruptcy admin-
 istration. . . . Until the commission of the act of bankruptcy he was, of
 course, the beneficial owner of whatever assets he possessed, but by the act
 of bankruptcy his title to be regarded as such beneficial owner is no longer
 absolute, but is contingent on no bankruptcy petition being presented within
 three months of the date of the act of bankruptcy which leads to a receiving
 order being made. If such receiving order be made the whole of the assets
 vest in his trustee as from the date of the act of bankruptcy. He is, there-
 fore, in the position that should such a contingency occur, he is from the date
 of the act of bankruptcy something less than a mere trustee of his assets
 for the creditors in his bankruptcy. Until this state of suspense has been
 removed either by a receiving order or by lapse of time, he has no right to
 deal with those assets that were in his hands, and can give no title in them
 to any transferee *with notice*. Similarly, with regard to the debts and other
 choses in action which form part of his estate, he cannot collect them or give
 a valid discharge for them, and any one making a payment to him *with notice*
 of the act of bankruptcy does so at his peril."

(3) *Law under Presidency-towns Insolvency Act, s. 57.*—Under the
 Presidency-towns Insolvency Act transactions between the commencement of
 the insolvency and the date of the order of adjudication are protected,
 (a) if the person who deals with the insolvent had no notice at the time of the
 presentation of an insolvency petition by or against the debtor, and (b) the trans-
 actions are *bona fide*. Notice of an act of insolvency does not take away the
 protection as it does under the English law (*q*), and this constitutes a material
 departure from the English law (*r*). If the transaction takes place after the
 commencement of the insolvency and before the presentation of a petition
 the only question will be whether the transaction was *bona fide*. If it takes
 place after the presentation of a petition, the questions will be (a) whether
 the person dealing with the insolvent had notice of the presentation of
 the petition, and (b) whether the transaction was *bona fide*.

The High Court of Madras has held, in a case under the Presidency-
 towns Insolvency Act, that where a creditor, after receiving notice from the
 debtor's agent that the debtor was going to suspend payment (such notice
 being an act of insolvency), takes possession on the day previous to the
 presentation of an insolvency petition of the debtor's goods under a letter
 of lien previously given by the debtor, the taking possession is not *bona*

(*q*) *Bhagwan Das & Co. v. Chuttan Lal*
 (1921) 43 All. 427, 432, 62 I. C. 732,
 (21) A. A. 41; [Prov. I. A.,
 sec. 55]; the second paragraph of

the head-note is not accurate.
 (*r*) *Mercantile Bank of India, Ltd. v*
Official Assignee, Madras (1916)
 39 Mad. 250, 255, 261, 35 I. C. 942.

Para. 656 *fide* and the creditor is not entitled to the protection of the section, though possession was taken before the presentation of the petition (s). This decision, it is submitted, is erroneous. Had the case to be decided under the Provincial Insolvency Act, the transaction would have been indisputably valid, for it took place before the date of the presentation of the petition, in other words, before the date on which insolvency commences under that Act. Had the case to be decided under the English law, the transaction would have been void against the trustee in bankruptcy, for it took place with notice of the act of bankruptcy, and the question of *bona fides* would not arise. Notice, however, of an act of insolvency does not take away the protection under the Presidency-towns Insolvency Act as it does under the English law. What has to be proved under that Act in order to take away the protection is that the creditor had notice of the presentation of the petition, and that the transaction was *mala fide*. The creditor in the Madras case had *ex hypothesi* no notice of the presentation, for the petition was presented the next day. Nevertheless the High Court held that the transaction was *mala fide*, the ground of the decision being that notice of an act of insolvency was in itself sufficient to render a transaction *mala fide*. In support of this view the Court relied upon certain English cases referred to in paragraph 653 above. None of those cases bears out the proposition of law laid down by the learned Judges. The point of the decision in those cases is that even if a person who deals with a bankrupt has no notice of an act of bankruptcy, the transaction will not be protected if it is *mala fide* or contrary to the policy of the bankruptcy laws (s1). Notice of an act of bankruptcy and want of *bona fides* are two distinct things. There is nothing against the policy of the bankruptcy laws in a creditor taking possession on the eve of his debtor's insolvency, of goods previously hypothecated to him by the debtor (t). If he takes possession with notice of an act of bankruptcy, the transaction is void as against the trustee, not because it is *mala fide*, but because the English section expressly says so. It appears from the proceedings of the Legislative Department that the words used in the Bill as originally drafted were "has not at the time notice of any available act of insolvency committed by the insolvent before that time." These words were omitted, and the words "has not at the time notice of the presentation of any insolvency petition by or against the debtor" were substituted. It also appears that this change was made under a misapprehension. See para. 29 above, "Relation back and protected transactions."

(4) *Law under Provincial Insolvency Act, s. 55.*—Under the Provincial Insolvency Act transactions between the commencement of the insolvency, that is, the date of the presentation of the petition on which the order of adjudication is made, and the date of the order of adjudication, are protected, if (a) the person who deals with the insolvent had at that time no notice of the *presentation of an insolvency petition by or against the debtor*, and (b) they are *bona fide*. A disposition of property by a debtor *before* the

(s) *Mercantile Bank of India, Ltd. v. Official Assignee, Madras* (1916) 39 Mad. 250, 35 I. C. 942; *Official Assignee, Madras v. Valliappa Chetty* (1922) 45 Mad. 238, 244-245, 69 I. C. 968, ('22)

A. M. 144.

(s1) See *Re Badham* (1893) 10 Morr. 252, 69 L. T. 356.

(t) See *Morris v. Morris* (1895) A. C. 625, 629.

date of the presentation of the petition on which the order of adjudication is made, cannot be impeached under that Act. Having regard to the date on which insolvency commences under the Provincial Insolvency Act, no question of notice of any act of insolvency can arise (u).

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(5) *The three systems compared.*—It will be noticed that the protection under the Provincial Insolvency Act is more extensive than under the Presidency-towns Insolvency Act, and the protection under the latter Act is more extensive than under the English law. The provisions under both the Indian Acts are more in favour of persons dealing with an insolvent than that under the English law (v).

657. Proceedings in invitum.—A “contract or dealing by or with an insolvent” means something done by the insolvent, and not a proceeding in which the insolvent is merely passive (w). Thus an order charging the share of a partner, who is subsequently adjudged insolvent, under O. 21, r. 49, of the Code of Civil Procedure, 1908, is a proceeding *in invitum* and not protected by this section (x).

658. Payments by insolvent.—A payment by the insolvent between the commencement of the insolvency and the date of the order of adjudication is protected, if the person who receives the money has no notice at that time of the presentation of a petition, and the transaction is bona fide. If the money is received with notice of the presentation of a petition, it is not protected and the person who receives it may be compelled to return it to the Official Assignee or Receiver. Even a secured creditor is not entitled to receive payment of his debt from his debtor *and to hand over the securities* after notice of the presentation of a petition. This is not a limitation of the secured creditor's rights and power to deal with his securities in any way in which he is entitled to deal with them by virtue of his contract with the debtor, but is only the consequence of the debtor having incapacitated himself from tendering the money (y). See para. 586 above.

A payment of a lost bet by the insolvent is not protected by the section though the person receiving the money has no notice at the time of the presentation of a petition. It is not a payment to a creditor within cl. (a) of the section, for a lost bet does not constitute a debt. Nor is it a transfer for “valuable consideration” within cl. (c). Nor is it a “contract or dealing” within cl. (d), for a contract or dealing within that clause means a contract which has contractual force and which involves a legal obligation (z).

A payment made by the insolvent between the commencement of the insolvency and the date of the order of adjudication with a view to preferring

(u) *Bhagwan Das & Co. v. Chuttan Lal*
(1921) 43 All. 427, 431, 62 I.C. 732,
(21) A. A. 41.
(v) (1921) 43 All. 427, 431, 62 I. C. 732,
(21) A. A. 41, *supra*.
(w) *Re O'Shea's Settlement* (1895) 1 Ch.

325, 331.
(x) *Wild v. Southwood* (1897) 1 Q.B. 317.
(y) *Ponsford, Baker & Co. v. Union*
of London and Smith's Bank,
Ltd. (1906) 2 Ch. 444.
(z) *Ward v. Fry* (1900) 85 L. T. 394.

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a creditor is not protected by this section (a). It is governed by sec. 56 of the Presidency-towns Insolvency Act [Provincial Insolvency Act, sec. 54].

659. Payment by insolvent to his solicitor.—A payment is not protected by this section, if the person who receives it has notice at that time of the presentation of an insolvency petition, and any amount so paid may be recovered back by the Official Assignee or Receiver from the person who has received it. To this, however, there is an exception. If a debtor pays in *cash* money which his solicitor requires to defray counsel's fees and other legal expenses in opposing a petition for adjudication filed against him, then, though he may be adjudged insolvent, the Official Assignee or Receiver cannot compel the solicitor to refund the money. This exception to the general rule is founded on legal necessity, as without it a debtor would be defenceless (b). It is like the case of an insolvent who goes with *ready money* to a tradesman and buys articles of ordinary necessity from him. The tradesman, though he may have notice of the presentation of a petition at the time, cannot be compelled to refund the money. The case of an accountant employed by the insolvent stands on the same footing. The exception, however, applies only to the case of ready money paid over, and it is not to be extended (c). Thus a solicitor or an accountant cannot take from the insolvent a *charge* on his property for services to be rendered to him (d). It would seem, at least in cases governed by the Presidency-towns Insolvency Act, that if a solicitor receives payment in advance from his client for the costs of preparing a deed of assignment for the benefit of his creditors, and he prepares the deed which his client executes and thereby commits an act of insolvency, and a petition is presented against the client on that act of insolvency and adjudication follows, the solicitor can only retain such portion of the money as was earned by him up to the act of insolvency, his authority being by that act revoked (e). See para. 586 above.

660. Payment and delivery to insolvent.—A payment of money due to the insolvent between the commencement of the insolvency and the date of the order of adjudication is a protected transaction if made *bona fide* and without notice of the presentation of an insolvency petition. Though the debt vests by relation back in the Official Assignee or Receiver it is discharged by a *bona fide* payment without notice (f), and it constitutes a valid discharge of the debt. See para. 588 above.

(a) See the opening words of s. 57 of the P.-t. I. A. and s. 55 of the Prov. I. A.

(b) See *Re Sinclair* (1885) 15 Q. B. D. 616; *Re Johnson* (1914) 111 L.T. 165.

(c) *Re Spackman* (1890) 24 Q. B. D. 728; *Re Whitlock* (1894) 1 Mans. 33.

(d) *Re Simonson* (1894) 1 Q.B. 433, 436.

(e) See *Re Pollitt* (1893) 1 Q. B. 455; *Re Beyts and Craig* (1894) 1 Mans. 56. As to work agreed to be done by a solicitor for a lump sum, see *Re Charlwood* (1894) 1 Q. B. 643; *Re Mander* (1902) 86 L. T. 234.

(f) *Onkarsa v. Bridichand* 73 I. C. 1037, ('23) A. N. 290.

The giving of a post-dated cheque to the insolvent which does not become due till after the insolvency in good faith and for value, and without notice of the presentation of an insolvency petition by or against him, is a protected transaction. There is no obligation on the person paying to stop payment of the cheque on receiving notice of the presentation of a petition (g).

661. Reputed ownership and protected transactions.—As regards goods and trade debts in the reputed ownership of the insolvent, the true owner may determine possession of the insolvent or withdraw his consent at any time before the commencement of the insolvency and thereby take them out of the order and disposition of the insolvent. Even if the goods are in the possession of the insolvent at the commencement of the insolvency, or, where the goods consist of trade debts, the debts are in his order or disposition, yet if the true owner not having notice of the presentation of any insolvency petition by or against the debtor, takes possession of the goods, or demands the goods, or gives notice of assignment of the debt to the insolvent's debtor, before the date of the order of adjudication and *bona fide*, the goods and the debts will be taken out of the order and disposition of the insolvent, and the title of the true owner will prevail against the Official Assignee. See para. 573 above.

661A. Payment with notice under contract made without notice.—This section, while it protects a *contract* made without notice of the presentation of an insolvency petition, does not purport to protect any *payment* or *conveyance* made in pursuance of a protected contract. Thus if purchase money is paid after notice of the presentation of an insolvency petition, though it be under a contract which is protected as being entered into before notice, the *payment* is not protected under this section (h).

662. Valuable consideration.—The expression “valuable consideration” in this section is not to be confined to fresh consideration, but will in general include a past debt (m). Forbearance to sue is valuable consideration within this section (n). Payment of a lost bet by the insolvent is not a dealing for valuable consideration, and is not protected by this section (o).

663 Notice.—Notice given to or information obtained by a solicitor in the course of the specific business transacted by him for his client has the same legal consequence as if it had been given to or obtained by the principal (p).

664. Burden of proving notice.—The burden of proving want of notice lies on the person who relies upon such want of notice (q).

- (g) *Ex parte Richdale* (1881) 19 Ch. D. 409.
- (h) *Powell v. Marshall, Park & Co.* (1899) 1 Q. B. 710.
- (m) *Re Jukes* (1902) 2 K. B. 58, 59;
Re Dunkley & Son (1905) 2 K.B. 683.
- (n) *Re Wethered* (1926) Ch. 167.

- (o) *Ward v. Fry* (1900) 85 L. T. 394.
- (p) *Chabildas Lalloobhai v. Dayal Mowji* (1907) 34 I. A. 179, 184, 31 Bom. 566, 581. See Indian Contract Act, 1872, s. 229.
- (q) *Ex parte Schulte* (1874) L. R. 9 Ch. App. 409; *Ex parte Revell* (No. 2) (1884) 13 Q. B. D. 727.

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665. Subsequent purchasers for value and without notice.—The protection afforded by this section extends only to persons having dealings immediately with the insolvent. It does not extend to a purchaser from a person who acquires a title from the insolvent through an unprotected transaction. Thus a transfer by the insolvent of his goods which is fraudulent and an act of insolvency under sec. 9 (b) of the Presidency-towns Insolvency Act (r), is not protected by this section. The transferee acquires his title through a transaction which is void as against the Official Assignee or Receiver, and if he subsequently sells the goods, though to a purchaser for value without notice of the presentation of a petition, the sale is void as against the Official Assignee or Receiver, and the purchaser does not acquire any title under it (s). In this respect the position of a subsequent purchaser under such a transfer is different from that of a purchaser under certain other transfers. Thus though a transfer made with intent to defeat or delay creditors is fraudulent and void under sec. 53 of the Transfer of Property Act, 1882, a *bona fide* purchaser for value from a transferee before the transfer is set aside acquires a good title as against the Official Assignee or Receiver as he is expressly protected by that section (t). Similarly, a *bona fide* purchaser for value from a donee under a voluntary settlement subsequently held to be void under sec. 55 of the Presidency-towns Insolvency Act (u), acquires a good title to the property, for the word "void" in that section means voidable, and the settlement is avoided not from its date, but only from the actual accrual of the title of the Official Assignee or Receiver (v). Again a *bona fide* purchaser for value from a preferred creditor acquires a good title against the Official Assignee or Receiver because of the protective provision contained in the fraudulent preference section (w). There is no such provision in the present section. It is indeed an anomaly that *bona fide* transferees for value from the insolvent are protected by this section, and not *bona fide* transferees for value from a transferee from the insolvent. This can only be rectified by legislation (x).

666. Debenture-holders, etc.—The principle that a person acquiring title under a transfer which is fraudulent and an act of insolvency under sec. 9 (b) of the Presidency-towns Insolvency Act (y), cannot give a good title even to a *bona fide* purchaser for value has been applied to companies which have acquired property under such a transfer. Thus

(r) Prov. I. A., s. 6 (b).

(s) *Re Gounshourgh* (No. 3), (1920) 2 K.B. 426.

(t) *Harrods Ltd. v. Stanton* (1923) 1 K. B. 516; *Kunhu Pothanassier v. Raru Nair* (1923) 46 Mad. 478, 72 I.C. 727, ('23) A.M. 558. If *Basti Begam v. Banarsi Prasad* (1908) 30 All. 297, decides otherwise, it

is not good law.

(u) Prov. I. A., s. 53.

(v) *Re Brall* (1893) 2 Q. B. 381.

(w) P.-t. I. A., s. 56 (2); Prov. I. A., s. 54 (2).

(x) *Re Gounshourgh* (No. 3), (1920) 2 K. B. 426, at pp. 442, 447.

(y) Prov. I. A., s. 6 (b).

it has been held that where a bankrupt trader fraudulently transfers his assets and his business to a company which is really a one man company, and the transfer is void as an act of bankruptcy, *bona fide* purchasers for value without notice, e.g., debenture-holders, have no title to the assets transferred to the company and comprised in the debentures to which the title of the trustee in bankruptcy relates back (z). If in a case such as the above the debenture-holders appoint a receiver to carry on the business of the company, they as well as the receiver are liable to account to the trustee for the assets (if any) of the debtor which may have come into the receiver's possession or for the value of them. The receiver is liable as a trespasser, and the debenture-holders are liable as principals of the receiver (a). If the bankrupt after transferring his business to the company induces a *bona fide* mortgagee of his business, who was no party to the formation of the company to accept debentures of the company in substitution for his mortgage, and the transfer to the company is set aside as fraudulent, the mortgagee is not remitted to his original position and he has no charge on the assets of the insolvent, though the debentures are worthless. His only remedy is to prove in the bankruptcy for damages resulting from the fraud (b).

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667. Suit by insolvent after presentation of petition and before adjudication.—A debtor who has presented an insolvency petition or against whom such petition has been presented can sue in respect of a debt due to him. If the defendant admits the debt, the proper procedure is that he should pay the money into Court to remain there until the Court could see who was the person properly entitled to it. If the plaintiff is not adjudicated an insolvent, the money belongs to the plaintiff, but if he is so adjudicated, the Official Assignee or the Receiver is the person entitled to the money. In either case the defendant is entitled to his costs of the action. If after suit the defendant pays the money to the plaintiff out of Court, he may be obliged to pay it again to the Official Assignee or Receiver, as the plaintiff is not competent after the presentation of an insolvency petition to receive and give a good discharge for the debt (c).

668. (3) Transactions after adjudication order.—The order of adjudication absolutely precludes all valid dealings by the insolvent in relation to his property except in certain cases of after-acquired property. The insolvent is a complete stranger to his property, and payments made to him of debts which pass to the Official Assignee or Receiver are completely inoperative and do not discharge the debtor (d). No assignment even for value of any

(z) *Re Donbrowski* (1923) B. & C.R. 32.

(a) *Re Goldburg* (No. 2), (1922) 1 K. B. 606.

(b) *Re Goldburg*, *supra*, *Ex parte Silverstone* (1912) 1 K. B. 384.

(c) *Ponsford, Baker & Co. v. Union of London & Smith's Bank* (1906)

2 Ch. 444; *McCarthy v. Capital and Counties Bank* (1911) 2 K. B. 1088; *Re A Debtor* (1912) 2 K. B. 533.

(d) See *Ponsford, Baker & Co. v. Union of London & Smith's Bank, Ltd.* (1906) 2 Ch. 444.

Para. 668 interest of the insolvent can after the order of adjudication be of any avail as against the Official Assignee or Receiver or confer any rights on the assignee (e). If the insolvent before adjudication transfers his property *benami* to another person, and the latter *after adjudication* sells the property, the transaction, though *bona fide* and for value, is void against the Official Assignee or Receiver; and the purchaser acquires no title under it. The original transfer being *benami*, the insolvent continues to be the owner, and the sale by the *benamidar* is really a sale by the insolvent (f).

If a person after adjudication pays a sum of money to the insolvent in fulfilment of a contract entered into before adjudication, the payment is not a valid discharge, and he may be compelled to pay it again to the Official Assignee or Receiver, even though he had no notice of the presentation of any insolvency petition either at the time of entering into the contract or at the time of payment (h). Where under a contract for the sale of land entered into before adjudication, the purchaser pays the purchase money to the insolvent after adjudication, he pays the wrong person and he cannot compel the Official Assignee or Receiver to execute a conveyance without paying the purchase-money again to him, even though he had no notice of the presentation of any insolvency petition either at the time of entering into the contract or at the time of payment (i). A transaction entered into after adjudication is not protected in any case, and the question of notice of the presentation of an insolvency petition does not arise; it is void irrespective of notice. The order of adjudication, however, must be actually in force at the date of the transaction (j). A payment made to the insolvent with the consent of the Official Assignee or Receiver during the pendency of the petition (k), or after adjudication (l), is a good discharge. See para. 273 above.

(e) *Ex parte Cooper* (1878) 39 L. T. 260.

(f) *Re Gobordhan Seal* (1916) 20 C. W. N. 554, 34 L. C. 435.

(h) *A. B. Miller v. Abinash Chunder Dutt* (1897) 2 C. W. N. 372
McEntire v. Potter & Co. (1889)
 22 Q. B. D. 433. See also *Re*

Wigzell (1921) 2 K. B. 835.

(i) *Ex parte Rabbidge* (1878) 8 Ch. D. 367.

(j) *Re Teale* (1912) 2 K. B. 367.

(k) *Rajkristo Singh v. Shaikh Shefa-toola* (1872) 17 W. R. 85.

(l) *Re Wilson* (1925) 133 L. T. 814.

LECTURE X.

PART VII.

DISCLAIMER OF ONEROUS PROPERTY.

[P.-t. I. A., ss. 62-67.]

669. Earlier statutes.—"By the Bankruptcy Acts prior to 1869 no particular provision was made for disclaimer. The assignee in bankruptcy was not bound to accept a *damnosa hereditas*, and leases were left outside the property which passed to the representative of the creditors. This led to a great deal of complication and difficulty and litigation, and by the Bankruptcy Act, 1869, further provision was made for the disclaimer of leases by the trustee in bankruptcy. To put it shortly, the disclaimer was by sec. 23 of that Act expressly made to operate as if there had been a voluntary surrender of the lease on the date of the order of adjudication. No doubt that provision was inserted for the express purpose of preserving the rights of sub-lessees and others claiming under the bankrupt lessee. But that provision was not found to work perfectly well, and when the Bankruptcy Act of 1883 was passed, sec. 55 was substituted for sec. 23 of the Act of 1869" (m). Sec. 55 of the Act of 1883 was amended by sec. 13 of the Bankruptcy Act, 1890. The provision as to disclaimer is now contained in sec. 54 of the Bankruptcy Act, 1914.

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670. Object of the enactment.—The Official Assignee has not only the right to set aside certain transfers by virtue of his superior title, but also the power to disclaim or get rid of onerous property. This power to disclaim is an exception to the general rule that the Official Assignee takes the estate of the insolvent subject to the same equities as those to which it was subject in the hands of the insolvent. Such a power is necessary to protect the Official Assignee from personal liability in respect of onerous property. Every disclaimer must operate to the injury of some person. It must affect some rights and liabilities. It is therefore the duty of the Official Assignee and of the Court to see that the exercise of the power is attended by as little interference as possible with the rights and liabilities of third persons. In *Re Carter & Ellis* (n), Vaughan Williams, L.J., said: "In my opinion the intention of the Legislature in cases of disclaimer by a trustee in bankruptcy clearly appears to have been, while they were providing for the relief of the trustee from liability in respect of onerous obligations of the bankrupt, including the obligations arising under a lease, to do so with as little disturbance as might be of the rights and liabilities of third persons by reason of the disclaimer."

(m) Per Vaughan Williams, L.J., in *Re Carter & Ellis* (1905) 1 K. B. 735, 743.
(n) (1905) 1 K. B. 735, 742.

Para. 671 **671. Disclaimer by Official Assignee [s. 62 (1)].**—The Official Assignee may disclaim any onerous property notwithstanding that he may have endeavoured to sell or have taken possession of the property, or exercised any act of ownership in relation thereto (o).

What is onerous property.—Land of any tenure burdened with onerous covenants, shares or stocks in companies, unprofitable contracts, or any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, are different forms of onerous property, and the Official Assignee may disclaim them subject to the provisions of the Act. He cannot, however, disclaim a contract entered into by the insolvent for the sale of a lease unless he also disclaims the lease itself. The section was intended to enable the Official Assignee to get rid of an onerous property or contract, and it does not enable him to disclaim a contract, under which a third person (i. e., purchaser) has acquired rights, merely because it would be more beneficial to the estate that the contract should not be carried out (p). If the Official Assignee disclaims the contract without disclaiming the lease, the disclaimer is a nullity, and specific performance of the contract may be enforced against him (q). Specific performance, however, of a contract to buy leaseholds will not be ordered against the Official Assignee (r).

Under the English law, where a lessee of premises assigns the premises by way of mortgage for the entire residue of the term, the mortgagee becomes by virtue of the assignment the owner of the lease burdened with the covenants and he becomes liable on the covenant for payment of rent. The assignor no longer possesses any land burdened with onerous covenants. All that he is entitled to is the equity of redemption. It has accordingly been held that where a lessee is adjudged bankrupt, the trustee in bankruptcy not being liable upon the covenants of the lease either by privity of contract or by privity of estate, the equity of redemption which vests in him is not "property burdened with onerous covenants," and no disclaimer is necessary (s). In India, where a lessee mortgages his interest in the land, the lessee remains liable for the rent. The mortgagee does not become liable for the rent unless he has entered into possession of the property (t). Disclaimer, therefore, by the Official Assignee is necessary, and if he omits to disclaim within the period prescribed by sec. 62 (1), he loses the right to disclaim (u).

(o) Under I. I. A., 1848, it was held that the taking of possession of leasehold property by the Official Assignee was proof of election on his part to take the lease: *Abdul Razak v. J. G. Kernan* (1898) 22 Bom. 617. See also *Chinna Subbaraya v. Kandaswami* (1876) 1 Mad. 59.

(p) *Re Bastable* (1901) 2 K.B. 518.

(q) *Pearce v. Bastable's Trustee in Bankruptcy* (1901) 2 Ch. 122.

(r) *Pearce v. Bastable's Trustee in Bankruptcy* (1901) 2 Ch. 122, 125.

(s) *Re Gee* (1890) 24 Q.B.D. 65.

(t) *Vithal Narayan v. Shriram Savant* (1905) 29 Bom. 391.

(u) *Krishna Chinnoo & Sons v. Marubhai* (1929) 53 Bom. 290, 117 I.C. 440, ('29) A.B. 107.

Disclaimer to be in writing.—A disclaimer of onerous property by the Official Assignee is of no effect unless it is in writing signed by him.

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Time for disclaimer.—The period allowed to the Official Assignee for disclaiming onerous property is twelve months after the debtor has been adjudged insolvent. If, however, the property came to the knowledge of the Official Assignee more than a month after such adjudication, he may disclaim the property at any time within twelve months after he first became aware of it.

672. Power to call on Official Assignee to disclaim [s. 64].—The Official Assignee has twelve months within which to elect whether he will keep an onerous property or disclaim it. To avoid any hardship which might arise from delay on his part it is provided that any person interested in the property may, by an application in writing to the Official Assignee, require him to decide whether he will disclaim or not, and if the Official Assignee fails to give notice that he disclaims the property within twenty-eight days after the receipt of the application, or such extended time as may be allowed by the Court, he will not be entitled to disclaim the property. If the notice is given in respect of a contract, and the Official Assignee does not disclaim within the aforesaid period, he will be deemed to have adopted it. If the notice is given by a landlord in respect of a lease, and the Official Assignee does not disclaim within the aforesaid period, he may render himself personally liable for rent and costs (*v*).

673. Disclaimer of leaseholds [s. 63].—As regards leaseholds the rule is that if the Official Assignee does not disclaim, he becomes personally liable for rent as from the date of adjudication, but he is not liable in respect of any breach of covenant happening before that date (*w*). He may, however, relieve himself of liability by assigning the lease, even to a pauper. Thus in one case where a trustee in bankruptcy, who had some disputes with the landlord with regard to the fixtures, gave a sovereign to a person whom he knew to be a pauper to become assignee, and the assignment was made, it was held that the assignment was good (*x*).

Leave to disclaim leaseholds.—The leave of the Court is necessary to disclaim leaseholds. Sec. 63 of the Act provides that subject to such rules as may be made in this behalf, the Official Assignee has no right to disclaim any leasehold interest without the leave of the Court; and the Court may, before or on granting such leave, require such notices to be given to all persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements and other matters arising out of the tenancy, as the Court thinks just.

(*v*) *Re Page* (1885) 14 Q.B.D. 401.
(*w*) *Titterton v. Cooper* (1862) 9 Q.B.D.
473.

(*x*) *Hopkinson v. Lovering* (1883) 11
Q.B.D. 92.

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674-676**

674. Effect of disclaimer [s. 62 (2)].—As regards the insolvent and his property, the disclaimer operates to determine, *as from the date thereof*, his rights, interests and liabilities in or in respect of the property disclaimed. As regards the Official Assignee personally, his liability in respect of the property is determined by the disclaimer *as from the date when the property vested in him*. Disclaimer releases the Official Assignee from all personal liability under a lease, even if he has entered into possession and paid rent, and its effect is to place him in the same position as if the property had never vested in him (y). The liabilities, however, from which the Official Assignee is released cover liabilities necessarily imposed by the vesting of the property disclaimed, such as liability to perform the covenants of a lease or to pay calls on shares or to give or pay for delivery of goods on contracts, but they do not cover liabilities which the Official Assignee voluntarily incurs, even though in doing so he is acting with prudence and in fulfilment of his duties to the estate (z).

Disclaimer does not affect the rights or liabilities of *third parties* except so far as is necessary for the purpose of releasing the insolvent and his property and the Official Assignee from liability. If, for instance, the insolvent has granted an under-lease of property demised to him, a disclaimer of the original lease by the Official Assignee does not affect the right of the lessor to distrain on the property for the rent reserved by the original lease, and to re-enter for breach of the lessee's covenants in the lease or for non-payment of the rent reserved thereby. If the under-lease is made at a rent less than the rent reserved by the original lease, the under-lessee is, after the disclaimer, entitled to prove in the insolvency for the value of the difference between the two rents (a).

675. Order rescinding contract [s. 65].—The Court may, on the application of any person who is, as against the Official Assignee, entitled to the benefit or subject to the burden of a contract made with the insolvent, make an order *rescinding* the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the insolvency. The question of rescission could not arise if the debtor had before his insolvency committed such a breach of the contract as would entitle the other party to repudiate.

676. Order vesting disclaimed property [s. 66 (1)].—Though the section does not say so in express terms, a disclaimer, it seems, would divest the property from the Official Assignee. The property being disclaimed, the Court has the power on the application of any person either claiming any interest in any disclaimed property, or under any liability not discharged

(y) See *Ex parte Allen* (1882) 20 Ch. D. 341.

(z) *Re Lister* (1926) 1 Ch. 149, 163.

(a) *Ex parte Walton* (1881) 17 Ch.D. 746.

by the Act in respect of such property, to make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just. On any such vesting order being made, the property comprised in it vests in the person therein named in that behalf without any transfer for the purpose.

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677. Vesting order in respect of leaseholds.—A limitation, however, is imposed on the power of the Court where the property disclaimed is of a leasehold nature. In respect of such property the Court cannot make a vesting order in favour of any person claiming under the insolvent, whether as under-lessee or as mortgagee, except upon the terms of making such person—

- (a) subject to the same liabilities and obligations as *the insolvent was subject to* under the lease in respect of the property at the date when the insolvency petition was filed, or, if the justice of the case requires it,
- (b) subject to the same liabilities and obligations as *if the lease had been assigned to him* at the date when the insolvency petition was filed.

In the first case the person in whose favour the vesting order is made will take the property as if he were the *original lessee* at the date when the petition was filed. In the second case he will take the property as if he were an *assignee of the lease* at that date. The second alternative is obviously the better one for the person in whom the property may be vested. The Court has a discretion as to which of the two alternatives to adopt, but if the exercise of the discretion in favour of the mortgagee will place him in no better position, and will place the lessor in no worse position, than if there had been no disclaimer, the discretion ought to be exercised in favour of the mortgagee by adopting the second alternative (b).

If the mortgagee fails to apply for a vesting order or refuses to accept a vesting order upon such terms as may be determined by the Court, it is competent to the Court, on the application of the lessor, to order that the property be vested in or delivered to him (c). If such an order is made, the mortgagee will thenceforth be excluded from all interest in, and security upon, the property, and the property will vest in the lessor, freed from the mortgage, and the only right of the mortgagee will be to prove as an unsecured creditor (d). In *Re Cock* (e), the Court said: "Where there is no person liable, either jointly with the bankrupt or alone, to perform the lessee's covenants, we are of opinion that the landlord may apply that the sub-lessee may

(b) *Re Carter & Ellis* (1905) 1 K.B. 735.

(c) *Re Cock* (1888) 20 Q. B. D. 343.
See also *Re Abubaker* (1924) 48 Bom. 580, 83 I. C. 809, ('24) A.B.

513.

(d) *Krishna Chinnoo & Sons v. Matubhai* (1929) 53 Bom. 290, 117 I.C. 440, ('29) A. B. 107.

(e) (1888) 20 Q.B.D. 343, 348.

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677-679

be put to his election. If he elects to take a vesting order he gets one. If he declines the landlord may ask for an order excluding the sub-lessee from all interest in and security upon the property, and vesting the property in him, the landlord, discharged from the sub-lease, because, by virtue of the disclaimer and of the exclusion of the sub-lessee he has become the party entitled." The Court may also, when necessary, vest the property in a trustee for the person applying for a vesting order (f).

678. Persons injured by disclaimer may prove [s. 67].—Any person injured by the operation of a disclaimer is deemed a creditor of the insolvent to the amount of the injury, and may accordingly prove the same as a debt under the insolvency.

Disclaimer by lessor for injury.—Where a lease is disclaimed, the lessor is entitled to prove for the amount representing the difference between the rent reserved under the lease and what he can obtain from another tenant for the property (g).

Proof in respect of disclaimer of shares.—Where a shareholder becomes insolvent and the Official Assignee disclaims the shares, the company or its liquidator may prove for the whole balance unpaid on the shares ; but if anything comes to the liquidator by operation of the disclaimer, that must be taken into consideration in reduction of the amount of proof, as, for instance, if the shares became vested in the company and had some value (h).

679. Insolvency Rules as to disclaimer.—Insolvency Rules as to disclaimer are Calcutta Rule 197, Bombay Rule 187 and Rangoon Rule 194.

(f) *Re Holmes* (1908) 2 K. B. 812.

(g) *Ex parte Llynvi Coal & Iron Co.*

(1871) L. R. 7 Ch. App. 28.

(h) *Re Hallett* (1894) 1 Mans. 380.

LECTURE XI.

PART I.

I. REALIZATION OF PROPERTY.

1. Realization of property by Official Assignee.

Some of the rules contained in the Presidency-towns Insolvency Act as to the *mode* of realization of the insolvent's property are different from those in the Provincial Insolvency Act. It is therefore necessary to treat each set of provisions separately. The *powers* of realization, however, of the Official Assignee and of the Receiver are the same, and they will be considered together. Para. 680

680. Possession of property by Official Assignee [P.-t. I. A., s. 58].—It is the duty of the Official Assignee to take possession as soon as possible of the deeds, books and documents of the insolvent and of all other parts of his property capable of manual delivery. If the insolvent is in possession of any such property, the Official Assignee alone is entitled to possession thereof. No other person can take possession of the property or require the Official Assignee to prove his title before giving up possession or require an indemnity from him. The insolvent being in possession, the Official Assignee is entitled to the rights which the insolvent had until some one else can prove a better title (*a*).

If the insolvent has sold his book debts and delivered his books of account to the purchaser, the Official Assignee cannot claim the books (*b*) [para. 682]. Nor can he compel delivery of books which are the joint property of the insolvent and another, though he is entitled to all reasonable facilities for inspecting the books (*c*). The existence of a lien on documents belonging to the insolvent in respect of professional services rendered to the debtor before his insolvency, does not entitle a solicitor to refuse to produce such documents for the inspection of the Official Assignee (*d*).

Official Assignee to have powers of a receiver under the Code of Civil Procedure, 1908.—The Official Assignee is, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, O. 40, r. 1, and the Court may on his application enforce such acquisition or retention accordingly.

Stock and shares.—Where any part of the property of the insolvent consists of stock, shares in ships, shares, or other similar property, the Official Assignee may exercise the right to transfer the property to the

(a) *Re Bryant* (1889) 6 Morr. 262.

(b) *Re West* (1882) 21 Ch. D. 868;
Re White & Co. (1884) 1 Morr. 77.

(c) *Re Burnand* (1904) 2 K.B. 38.

(d) *Re Toleman & England* (1880)
13 Ch. D. 885.

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extent to which the insolvent could have exercised it, if he had not become insolvent.

Choses in action.—Things in action form part of the property of the insolvent and they pass to the Official Assignee like any other property. No writing is necessary for transferring them to him, and they are deemed to have been duly transferred to him as soon as the order of adjudication is made.

681. Special remedies open to the Official Assignee [P.-t. I. A., ss. 58 (5), 59].—The Official Assignee is the owner of the property which vests in him, and he has open to him all the ordinary remedies which are open to an owner of the property. Besides the ordinary remedies there are certain special remedies open to the Official Assignee.

(1) *Duty of bankers and agents of the insolvent.*—Any treasurer or other officer, or any banker, attorney or agent of an insolvent, is bound to pay and deliver to the Official Assignee all money and securities in his possession or power as such officer, banker, attorney or agent, which he is not by law entitled to retain as against the insolvent or Official Assignee. Failure to comply is a contempt of Court punishable on the application of the Official Assignee. These provisions do not apply until after an order of adjudication has been made. Therefore, failure to comply with the demand of an *interim* Receiver appointed under sec. 16 of the Act before adjudication is not a contempt of Court (e).

(2) *Seizure of property of insolvent.*—The Court may also grant a warrant to any prescribed officer of the Court or any police-officer above the rank of a constable to seize any part of the property of the insolvent in the custody or possession of the insolvent or of any other person. For this purpose the Court may authorize the breaking open of any house, building or room of the insolvent where the insolvent is supposed to be, or any building or receptacle of the insolvent where any of his property is supposed to be. If the Court is satisfied that there is reason to believe that the property of the insolvent is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any such officer as aforesaid (f).

(3) *Summoning third persons for examination.*—The Official Assignee may also apply to the Court under sec. 36 of the Act to summon before it for examination any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent. If any person so summoned refuses to come before the Court at the time appointed, the Court may by warrant cause him to be arrested and brought up for examination. This subject has been dealt with in paragraphs 300-314 above.

(e) *R. M. M. S. T. M. Chettiyar v. Official Assignee* (1927) 5 Rang. 244, 103

I. C. 184, ('27) A. R. 193.
(f) P.-t. I. A., s. 100.

682. No lien on insolvent's books [P.-t. I. A., s. 124].—No person is entitled as against the Official Assignee to withhold possession of the books of account belonging to the insolvent or to set up any lien thereon. Any creditor may, subject to the control of the Court, inspect such books in the possession of the Official Assignee. See para. 680 above.

683. Official Assignee and his successors [P.-t. I. A., s. 61].—The property of the insolvent passes from Official Assignee to Official Assignee, and vests in the Official Assignee for the time being during his continuance in office without any transfer whatever.

2. Realization of property by Receiver.

684. Possession of property by Receiver [Prov. I. A., s. 56 (3)].—Sec. 56 (3) of the Provincial Insolvency Act, 1920, provides that where the Court appoints a Receiver, it may remove any person in whose possession or custody any property of the insolvent is from the possession or custody thereof, but this shall not be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove. This section is a re-enactment of sec. 18 (3) of the Provincial Insolvency Act, 1907.

Sec. 4 of the Act of 1920 empowers the Insolvency Court to decide questions of title as between the insolvent and third persons. The absence of such a provision in the Act of 1907 gave rise to the question whether the Insolvency Court had the power, where an application was made by the Receiver for an order against a third person under sec. 18 (3) of that Act to deliver possession to him of property alleged to belong to the insolvent, but claimed by such person as his own, to decide the question of title as between the insolvent and such person. The High Court of Allahabad held that it had the power. The High Court of Calcutta held that it had no such power and that the question of title should be tried by a Civil Court. To put an end to this conflict, sec. 4 was introduced in the Act of 1920. Since the enactment of sec. 4 the Courts exercising jurisdiction under the Provincial Insolvency Act have been deciding questions of title, and it is believed that there is no reported case in which the Insolvency Court has refused to decide such cases and left the questions of title to be tried by Civil Courts. The Legislature itself gave the lead, at any rate since 1920, and it further sanctified their decisions by enacting that they should operate as *res judicata* (g).

In cases under the Presidency-towns Insolvency Act, the High Court of Madras assumed jurisdiction to try questions of title under sec. 7 of the Act, while the High Courts of Calcutta and Bombay did not, and they left the matter to be tried by ordinary tribunals. In 1927 the

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Legislature came to the conclusion that the trial of questions of title by an Insolvency Court was not desirable, and sec. 7 of the Presidency-towns Insolvency Act was amended by Act XIX of 1927 with the result that Courts exercising jurisdiction under that Act cannot now exercise the power to decide matters arising under sec. 36 of the Act except with the consent of all parties. It cannot be said yet what effect the recent Full Bench ruling of the Madras High Court (*h*) [para. 62A] is likely to have on Courts in the mofussil. No such amendment was made in the Provincial Insolvency Act, for it was supposed that Courts exercising jurisdiction under that Act did not themselves decide questions of title but left them to be tried by civil Courts. This was a misapprehension, and the sooner the two Acts are brought into line in this respect the better. Simultaneously with this change it is desirable that the provisions of sub-secs. (4), (5), (6) and (7) of sec. 36 and of sec. 37 of the Presidency-towns Insolvency Act should be incorporated in sec. 59 A of the Provincial Insolvency Act. Sec. 56 (3) of the latter Act may be replaced by a provision similar to that in sec. 58 (2) of the Presidency-towns Insolvency Act.

685. Power of Court to remove persons from possession.—The Court alone has the power to remove a person who is in possession of any property from the possession thereof. The Receiver has no such power. A Receiver is not a judicial officer and he cannot make a judicial inquiry (*i*). His primary duty is to realize the assets of the insolvent and distribute them amongst the creditors. He cannot decide questions of title nor has the Court power to authorize him to decide such questions. The Court may, however, whenever necessary, direct him to inquire into specific matters and report to it for its own information, but the Court should not accept the report without itself considering the matter (*j*). The Receiver has no power to make an order against debtors of the insolvent. He can call upon them to pay what they owe to the insolvent, but if they do not pay, he must seek his remedy by suit (*k*). Where the property belongs to the insolvent, the Receiver may take possession of it. But he cannot take possession of property to which an adverse claim is made, nor has the Court power to direct the Receiver to deal with property other than that which belongs to the insolvent (*l*).

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| <p>(<i>h</i>) <i>Official Assignee of Madras v. Narasimha Mudaliar</i> (1929) 52 Mad. 717, 118 I.C. 506, ('29) A. M. 705.</p> <p>(<i>i</i>) <i>Nilmoni Choudhury v. Durga Charan Choudhury</i> (1918) 22 C. W.N. 704, 46 I.C. 377; <i>Goberdhan Das v. Jagat Narain</i> (1926) 94 I.C. 506, ('26) A.P. 291.</p> <p>(<i>j</i>) <i>Meenakshi Ammal v. Rama Aiyar</i> (1914) 37 Mad. 396, 18 I.C. 34; <i>Sani Prasad Singh v. Sheodut</i></p> | <p><i>Singh</i> (1923) 2 Pat. 724, 77 I.C. 589, ('24) A.P. 259.</p> <p>(<i>k</i>) <i>Menahim v. Ahraim Solomon</i> (1923) 47 Bom. 548, 84 I.C. 684, ('23) A.B. 233. It has been held that he may also proceed by an application under sec. 4 of the Prov. I. A.</p> <p>(<i>l</i>) <i>Sanyasi Charan v. Asutosh Ghose</i> (1915) 42 Cal. 225, 26 I.C. 836; <i>Pulaniappa Mudali v. Official Receiver of Trichinopoly</i> (1917) 32 Mad. L.J. 84, 35 I.C. 610.</p> |
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An application for possession may be made by the Receiver. It may also be made by a purchaser from the Receiver (*m*). Under the Provincial Insolvency Act, 1907, it was held by the High Court of Allahabad that when the person in possession claims the property as his own, the Court had the power under sec. 18 (3) of that Act to decide whether the property belonged to the insolvent or to such person, and if it found that such property was the property of the insolvent, to order its delivery to the Receiver (*n*). Under the Act of 1920, it has been held that if a person is in possession of property on behalf of the insolvent, possession of such property may be taken under the orders of the Court by the Receiver, but where the person in possession claims adversely to the insolvent or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under sec. 56 (3) of the Act and to direct the person in possession to deliver the property to the Receiver; in such a case proceedings should be taken under sec. 4 of the Act, and the Court has the power under that section to decide the question of title. If the Court proceeds under sec. 56 (3), and makes an order for delivery of possession, the order is illegal as the insolvent himself is not entitled to present possession of such property (*o*).

If property belonging to the insolvent is sold in execution of a decree against him after an order of adjudication has been made, the Receiver may apply to the Insolvency Court under this section to annul the sale, and order delivery of the property to him. The Receiver is not bound to bring a suit for that purpose (*p*).

686. Limitation on power of Court to remove persons from possession.—By reason of the proviso to sec. 56 (3) the Court has no power under this section to remove from the possession of property any person whom the insolvent has not a *present* right so to remove. This proviso is in almost the same terms as O. 40, r. 1 (2), of the Code of Civil Procedure, 1908, which relates to the powers of receivers appointed under the Code. O. 40, r. 1 (2), provides that “nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a *present* right so to remove.” Under sec. 58 (2) of the Presidency-towns Insolvency Act the Official Assignee is to be, for the purpose of acquiring possession of the property of the insolvent, in the same position

- (*m*) *Ramaswami Chettiar v. Ramaswami Iyengar* (1922) 45 Mad. 434, 65 I.C. 394, ('22) A.M. 147.
- (*n*) *Bansidhar v. Kharagji* (1915) 37 All. 65, 26 I.C. 926; *Jagrap Sahu v. Ramanand Sahu* (1917) 39 All. 633, 40 I.C. 373.
- (*o*) *Chittammal v. Ponnuswami Naicker* (1926) 49 Mad. 762, 92 I.C. 573, ('26) A.M. 363; *Ramaswami Chettiar v. Ramaswami Iyengar*

- (1922) 45 Mad. 434, 65 I.C. 394 ('22) A.M. 147; *Goberdhan Das v. Jagat Narain* (1926) 94 I.C. 506, ('26) A.P. 291.
- (*p*) *Official Receiver, Tinnevely v. Shankarlinga Mudaliar* (1921) 44 Mad. 524, 62 I.C. 495, ('21) A.M. 204; *Kochu Mahomed Asan Tharagan v. Sankaralinga Mudaliar* (1921) 44 Mad. 544, 62 I.C. 393, ('21) A.M. 102.

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as if he were a receiver of the property appointed under the Code, and the Court may on his application enforce such acquisition accordingly. The proviso to sec. 56 (3) of the Provincial Insolvency Act shows that the power of the Court under that section is not higher than that of the Official Assignee. The proviso imposes a restriction on the power of Courts exercising jurisdiction under the Provincial Insolvency Act. It has reference to cases where a person is in possession under a lease or a usufructuary mortgage from the insolvent (g).

A person who claims adversely to the insolvent is a person whom the insolvent has not a *present* right to remove from possession. The Court therefore has no power to remove such a person from possession under sec. 56 (3). He can be removed from possession only after an inquiry under sec. 4 of the Act (r). On the other hand a person in possession of the insolvent's property under an execution sale made *after* the order of adjudication is a person who may be removed from possession under sec. 56 (3) of the Act (s).

687. Contempt of Court.—The High Courts established by Letters Patent possess the power of enforcing obedience to their orders by imprisonment for contempt. The jurisdiction to imprison for contempt is a jurisdiction inherited from the old Supreme Courts which were invested with all the powers and authority of the then Courts of King's Bench and of the Court of Chancery in England (t). District Courts have no power to commit for contempt (u). The Chartered High Courts had no power until 1926 to commit for contempt of a mofussil Court either under any Act or under the Common Law (v). Such power was conferred upon them for the first time by the Contempt of Courts Act, 1926. Sec. 2 of that Act provides that the High Courts established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves. The punishment for contempt is simple imprisonment for a term which may extend to six months or fine which may extend to Rs. 2,000 or both, but the accused may be discharged or the punishment may be remitted on apology being made to the satisfaction of the Court. No High Court, however, under that Act can take cognisance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

- (g) *Kochu Mahomed Asun Tharagan v. Sankaralinga Mudaliar* (1921) 44 Mad. 544, 62 I.C. 393, ('21) A.M. 102.
(r) *Chittannal v. Ponnuswami Naicker* (1926) 49 Mad. 762, 92 I.C. 573, ('26) A.M. 363, ('21) A.M. 102.
(s) (1921) 44 Mad. 544, 62 I.C. 393, *supra*.
(t) *Martin v. Lawrence* (1879) 4 Cal. 655; *Hasonbhoy v. Cowasji*

- Jehangir Jassawalla* (1883) 7 Bom. 1; *Navivahoo v. Narottamdas Candas* (1883) 7 Bom. 5; *Dwijendra Krishna Datta v. Surendra Nath Nag Chowdhury* (1928) 32 C.W.N. 525, 101 I.C. 112, ('27) A.C. 548.
(u) *Kochappa v. Sachi Devi* (1903) 26 Mad. 494.
(v) *Legal Remembrancer v. Motilal Ghose* (1914) 41 Cal. 173, 20 I.C. 81.

Under the Presidency-towns Insolvency Act the High Courts established by Letters Patent and the Court of the Judicial Commissioner of Sind (w) have power to punish for contempt of Court in the matters specified in that Act. No such power has been conferred upon Courts exercising jurisdiction under the Provincial Insolvency Act, for no such Court has inherent jurisdiction to commit for contempt. It is conceived that the Contempt of Courts Act, 1926, applies to disobedience of orders of these Courts also.

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688. Special provisions as to immovable property paying revenue to Government [Prov. I. A., s. 60].—In any local area in which a declaration has been made under sec. 68 of the Code of Civil Procedure, 1908, and is in force, no sale of immovable property paying revenue to the Government or held or let for agricultural purposes may be made by the Receiver ; but, after the other property of the insolvent has been realised, the Court is required to ascertain the amount required to satisfy the debts proved under the Act after deducting the monies already received, the immovable property of the insolvent remaining unsold, and the incumbrances (if any) existing thereon. The Court is also required to forward a statement to the Collector containing the particulars aforesaid. The Collector must then proceed to raise the amount so required by the exercise of such of the powers conferred on him by paragraphs 2 to 10 of the Third Schedule to the said Code as he thinks fit, and subject to the provisions of those paragraphs so far as they are applicable, and he must hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers.

Nothing in the Act is to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immovable property, and such provisions are to apply to the enforcement of an order of adjudication made under the Act as if it were such a decree or order.

Transfer of proceedings to Collector.—Where proceedings are transferred to the Collector under this section, the civil Court has no jurisdiction to interfere with the proceedings of the sale officer and has no authority to sanction a sale made by the Collector or his subordinate, nor has the sale officer any authority to refer the case to the civil Court for sanction (x).

Land belonging to agricultural tribes in the Punjab.—The first clause of sec. 60 does not apply in the Punjab. The Insolvency Court, therefore, has power to proceed against the land of an insolvent who is a member of an agricultural tribe in the Punjab. Ordinarily, however, the Insolvency Court should not make a permanent alienation of land, and it should as far as possible proceed on the same principles as are to be followed by a Court in

(w) P.-t. I. A., s. 90 (8).

(x) *Girdhari Lal v. Jhama Lal* (1927) |

49 All. 272, 98 I.C. 1046, ('27)
A.A. 203.

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proceedings relating to the execution of decrees against members of an agricultural tribe (y). The Court may, however, in a proper case depart from those principles and make a permanent alienation of the land (z).

3. Powers of Official Assignee and Receiver as to realization.

689. Powers of Official Assignee and Receiver as to realization [P.-t. I. A., s. 68 ; Prov. I. A., s. 59].—It is the duty of the Official Assignee or Receiver to realize the property of the insolvent, and to enable them to do so there are certain powers conferred upon them by both the Acts. Some of these powers may be exercised without, and some with, the leave of the Court.

690. Powers which may be exercised without the leave of the Court.—The following powers may be exercised without the leave of the Court :—

(1) *Power of sale.*—The Official Assignee and the Receiver may sell all or any part of the property of the insolvent (a). They may sell the property by public auction or by private treaty (b). The provisions of the Code of Civil Procedure, 1908, relating to the procedure for sales in execution of decrees do not apply to sales by the Official Assignee or Receiver. A sale by the Official Assignee or Receiver is not a “proceeding” within the meaning of sec. 90 of the Presidency-towns Insolvency Act or the corresponding sec. 5 of the Provincial Insolvency Act. It is a sale by the owner, and not by the Court. The Official Assignee or Receiver may therefore sell the property not only by public auction but also by private treaty (c). For the same reason the provisions of O. 21, r. 89, do not apply to sales by the Official Assignee or Receiver (c1). If, however, the purchaser is resisted in obtaining possession, the provisions of the Code apply, for an application for possession is a “proceeding” within the meaning of these sections (d). Neither the Official Assignee nor the Receiver can sell any property which is inalienable either by law or by custom (e). A sale by the Official Assignee or Receiver may be set aside on the ground of fraud or collusion. It may also be set aside on the ground of material illegality or irregularity in

(y) *Manji v. Girdhari Lal* (1921) 2 Lah. 78, 61 I.C. 664, ('21) A.L. 44.

(z) *Lachman Singh v. Mahant Ram Das* (1929) 117 I.C. 669, ('29) A.L. 86.

(a) *Woonwalla & Co. v. N. C. Macleod* (1906) 30 Bom. 515.

(b) *Entazuddi Sheikh v. Ram Krishna Banik* (1920) 24 C. W. N. 1072, 60 I. C. 745.

(c) (1920) 24 C. W. N. 1072 60 I. C. 745, *supra*. See also *Mul Chand v. Murari Lal* (1914) 36 All. 8, 21 I. C. 702, where it was held that O. 21, r. 58, of C. P. C., 1908, did

not apply to proceedings in insolvency.

(c1) *Maung Tha Dun v. Po Ka* (1927) 5 Rang. 768, 107 I. C. 172, ('28) A. R. 60.

(d) *Ramaswami Chettiar v. Ramaswami Iyengar* (1922) 45 Mad. 434, 69 I. C. 394, ('22) A. M. 147.

(e) *Arman Sardar v. Sathkira Joint Stock Company, Ltd.* (1913) 18 Cal. L. J. 564, 20 I. C. 273. See *Chandra Binoda Kundu v. Sheikh Ala Buz Dewan* (1920) 48 Cal. 184, 58 I. C. 353.

conducting the sale if the interests of the creditors are prejudiced thereby (f). **Para. 630**
 Fraudulent misrepresentation by a *creditor* is no ground for setting aside a sale (g).

The Official Assignee is bound, like any other vendor, to make out a good title to the property which he sells, unless there is an express condition to sell with such title as he has. The same rule applies to a Receiver. "If assignees choose to advertise that they have not a good title, or that they will only sell such title as they have, that is one thing. But if they advertise in the common way there is no good reason why they should not be bound as other persons" (h).

Neither the Official Assignee nor the Receiver can buy the property of the insolvent (i), but a sale to the insolvent himself is not invalid. In *Kutson v. Hardwick* (j), Wills, J., said: "If the trustee offers the property for sale by public auction, the more bidders there are the better. I do not see why the bankrupt himself should be precluded from bidding. . . . I can conceive many cases in which it would be highly desirable that the bankrupt should have an opportunity of becoming the purchaser of the stock in trade and book debts. Having had much experience in bankruptcy, I have seen the advantage of giving the debtor a chance of getting back the business, especially where it is one which depends upon the personal influence or skill of the individual. In many cases, a higher price might be obtained from him than a stranger would be willing to give." A sale of a bankrupt's property by the trustee to a *member* of the committee of inspection is invalid, but not a sale to a *partner* of such member if the partner bought the property for himself and not for the partnership (k).

Sale of goodwill.—By Exception 1 to sec. 27 of the Indian Contract Act, 1872, it is provided that an agreement whereby the seller agrees with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer carries on a like business therein is valid, provided that such limits are reasonable, and the buyer can restrain the seller from interfering with the goodwill by soliciting former customers. This rule does not apply to a sale of the good will of the insolvent's business by the Official Assignee or Receiver. The reason is that a sale by the Official Assignee or Receiver is, so far as the insolvent is concerned, a compulsory sale. "The bankrupt himself can probably be compelled to join in the conveyance

- (f) *Maung Tha Dun v. Po Ka.* (1927) 5 Rang. 768, 107 I. C. 172, ('28) A. R. 60; *Thiruvengkatachiar v. Thangayiammal* (1916) 39 Mad. 479, 29 I. C. 294; *Ramabadra Chetty v. Ramaswami Chetty* (1923) 44 Mad. L. J. 284, 73 I. C. 374, ('23) A. M. 350.
 (g) *Ammasi Goundan v. P. L. V. V. R. Subramania Chettiar* (1926) 97

- I. C. 781, ('26) A. M. 1080.
 (h) *M'Donald v. Hanson* (1806) 12 Ves. 277, 33 E. R. 106.
 (i) *Ram Komal Saha v. Bank of Bengal* (1900) 5 C. W. N. 91.
 (j) (1872) L. R. 7 C. P. 473.
 (k) *Re Gallard* (1897) 2 Q. B. 8. As to committee of inspection see P.-t. I. A., s. 88; Prov. I. A., s. 67 A.

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or assignment of his business and goodwill for the benefit of his creditors, but he cannot be compelled to enter into any covenant restricting him from carrying on business in future in any way whatever" (l).

In an English case where share certificates had been pledged with the bankrupt, and the pledgor had disappeared without repaying the loan, the trustee in bankruptcy was given permission to sell the shares after advertising for the pledgor as directed by the Court (m).

(2) *Power to give receipts*.—The Official Assignee and the Receiver may also give receipts for any money received by them. Such receipts will effectually discharge the person paying the money from all liability.

691. Powers which may be exercised with the leave of the Court.—There are certain powers conferred upon the Official Assignee or Receiver which may be exercised with the leave of the Court. *Leave of the Court, however, is not a condition precedent to the exercise of any of these powers.* The leave is merely a provision for the protection of the estate and the absence of leave does not vitiate any proceedings taken by the Official Assignee or Receiver under this part of the section (n). Therefore, a compromise made by the Official Assignee or Receiver without the leave of the Court is not invalid (o). There are two cases which contain *dicta* to the effect that the leave of the Court is a condition precedent to the exercise of these powers. In one of them it was said that the Official Assignee could not carry on the business of the insolvent unless he had obtained the leave of the Court (p). In another case it was said that the Receiver had no power to do any of the acts mentioned in cl. (c) and subsequent clauses without the previous sanction of the Court (q). These *dicta*, it is submitted, are erroneous. If the Official Assignee or Receiver exercises any of these powers without the leave of the Court, the aggrieved party has a remedy by way of appeal from any act done by him, but the act itself is not a nullity (r).

1. *Conduct of insolvent's business*.—The Official Assignee or Receiver may with the leave of the Court, carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same. The business must not be carried on for any purpose other than that of winding up, e.g., in the hope of making a profit, even though the majority of creditors authorize

- (l) *Walker v. Mottram* (1881) 19 Ch. D. 355; *Green & Sons (Northampton), Limited v. Morris* (1914) 1 Ch. 562 (sale by a trustee under a deed of assignment for the benefit of creditors).
(m) *Re Harrison and Ingram* (1906) 14 Mans. 132.
(n) *Re Branson* (1914) 2 K. B. 701; *Laduram v. Nandalal* (1920) 47 Cal. 555, 557, 55 I. C. 747; *Mahomed Ghalif v. Abdul Rahim* (1925) 49 Mad. L. J. 628, 91 I. C.

- 319, ('26) A. M. 156.
(o) *Lalchand Gobindram v. Tejchand Jagannath* (1929) 112 I. C. 452, ('29) A. S. 41.
(p) *C. E. Grey v. Lamond Walker & Co.* (1913) 17 C. W. N. 578, 580, 18 I. C. 756.
(q) *Thiruvengkatachariar v. Thangayiammal* (1916) 39 Mad. 479, 482, 29 I. C. 294.
(r) P.-t. I. A., ss. 86, 101; Prov. I. A., s. 68.

him to do so (s). A priest attached to a temple, who receives pilgrims, houses them, feasts them and accompanies them to the temple in return for a fee in the nature of a voluntary payment, does not carry on "business" within the meaning of this clause, and the Official Assignee or Receiver has no power to interfere with the exercise of his calling (t). Para. 691

2. *Suits and other legal proceedings*.—The Official Assignee or Receiver may, with the leave of the Court, institute, defend, or continue any suit or other legal proceedings relating to the property of the insolvent. This subject is considered in paragraph 694 *et seq.*

3. *Employment of legal practitioner*.—The Official Assignee and the Receiver may, with the leave of the Court, employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court. The legal practitioner must be one quite independent of the committee of inspection. Thus where one of the members of the committee of inspection was the managing clerk of a solicitor, and the trustee in bankruptcy employed that solicitor, it was held that the appointment was improper, and should be set aside (u). A solicitor who acts for the Official Assignee has a lien on documents upon which he has expended his own labour, but not upon documents belonging to the estate (v).

4. *Acceptance of consideration for sale*.—Under the Presidency-towns Insolvency Act the Official Assignee may, with the leave of the Court, accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or *fully paid up shares, debentures or debenture stock in any limited company*, subject to such stipulations as to security and otherwise as the Court thinks fit. The words in italics do not occur in the corresponding clause of the Provincial Insolvency Act.

5. *Mortgage of insolvent's property*.—Under the Presidency-towns Insolvency Act the Official Assignee may, with the leave of the Court, mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or *for the purpose of carrying on the business*. The words in italics do not occur in the corresponding clause of the Provincial Insolvency Act.

6. *Arbitration and compromise*.—The Official Assignee and the Receiver may, by leave of the Court, refer any dispute to arbitration, and compromise all debts, claims and liabilities on such terms as may be agreed upon.

In an English case the trustee in bankruptcy applied for leave to compromise certain claims which the bankrupt had against certain companies. The facts were extremely complicated and Bigham, J., refused to give any directions. The learned Judge said: "The application is by the trustee for the sanction of the Court to enter into a compromise of certain claims which the

(s) *Ex parte Emmanuel* (1881) 17 Ch. D. 35.

(t) *Anand Mahanti v. Ganesh Maheswar*

(1913) 40 Cal. 678, 21 I. C. 969.

(u) *Re Gallard* (1896) 1 Q. B. 68.

(v) *Ex parte Yalden* (1876) 4 Ch. D. 129.

Para. 691 bankrupt is supposed to have against a number of different corporations and persons. The circumstances which are put forward in support of the compromise are extremely complicated and difficult to understand. They present considerations of a kind which, in my opinion, the trustee ought himself to deal with, with the assistance of the committee of inspection, and it is not right that he should apply to the Court to relieve him from the obligation which the Act of Parliament puts upon him. He is a man of business and he must consider for himself whether the compromise is reasonable or not. The committee of inspection have a right to be consulted in the matter. They must form their opinion about it. I am not going to say a word either in favour of this compromise or against it" (w). If the majority of creditors are opposed to a compromise, the Court will as a general rule refuse leave to compromise (x).

The insolvency of a party to a reference does not of itself operate as a revocation of the submission, whether the submission is by order of the Court or not (y). The insolvent would be bound by the award, but the submission is not binding on the Official Assignee or Receiver. It would seem, however, that where the submission forms one of the terms of the contract, the Official Assignee or Receiver cannot take advantage of the contract and at the same time repudiate the arbitration clause (z). The insolvency of a party, however, would probably be a good ground for revocation of a submission. "It is of the very essence of an arbitration that the submission should be mutual, and that the award should be mutual and final. Here, although the submission was at first mutual, it did not continue so, but an assignment was made of Rowe's claims, which destroyed the mutuality" (a).

Where during the pendency of insolvency proceedings litigation arose between the receiver, secured creditors and holders under certain transfers alleged to be fictitious, with regard to the realization of assets and the payment of debts, and all the parties agreeing to refer the whole matter to arbitration without the intervention of the Court, an award was made, it was held that the award was to be deemed an adjustment within the meaning of O. 23, r. 3, of the Code of Civil Procedure, 1908, and that a decree could be made in terms of the award (b).

In England it has been held that an agreement between the trustee in bankruptcy and some of the creditors of the bankrupt whereby the creditors are to carry on an action filed by the bankrupt before his adjudication at their own risk and expense, and to take a larger

(w) *Re Pilling* (1906) 2 K. B. 644.

(x) *Re Ridgway* (1889) 6 Morr 277.

(y) *Andrews v. Palmer* (1821) 4 B. & Ald. 250, 106 E. R. 929.

(z) *Marsh v. Wood* (1829) 9 B. & C. 659, 109 E. R. 245; *Hemsworth v. Brian* (1845) 1 C. B. 131;

Pennell v. Walker (1856) 18 C. B. 651.

(a) *Marsh v. Wood* (1829) 9 B. & C. 659, 109 E. R. 245.

(b) *Ram Devi v. Ganesh Lal* (1926) 48 All. 475, 95 I. C. 416, ('26) A. A. 501.

share of the fruits of the action than they otherwise would have done, **Para. 691** does not contravene the law against champerty and maintenance, and that such an agreement is permitted by the bankruptcy laws (c). In a Madras case (d), the debtor had before his adjudication instituted a suit to recover Rs. 7,00,000. After his adjudication leave was granted to the Official Assignee to continue the suit upon the terms that he should deposit Rs. 6,000 as security for the costs of the defendants in that suit. The liabilities of the insolvent amounted to about Rs. 4,00,000 and his assets were almost nil. Four of the creditors of the insolvent whose aggregate claims amounted to about Rs. 46,000 agreed to lend Rs. 6,000, being the amount required for the deposit, to the Official Assignee, if their debts were first paid in full out of the amount, if any, that might be recovered in the suit, and that the other creditors should be paid only out of the balance that might remain after payment in full of their debts. The Official Assignee applied for leave to enter into the agreement, but leave was refused on the ground that the policy of the bankruptcy laws was to treat all creditors equally, and that if the arrangement were sanctioned it would be giving preference to the four creditors in the payment of their debts. It is submitted that if the arrangement was that the loan should be repaid in the event of the suit being lost, and, further, if the suit was to be continued by the Official Assignee at the cost of the estate, leave was rightly refused for such an arrangement could not be said to be for the benefit of the estate; but if the loan was not to be repaid, and the four creditors were to bear all the costs of the suit including such costs as the Official Assignee might have to pay to the defendants, the arrangement could not be said to be against the policy of the bankruptcy laws merely because some of the creditors were to be paid in full in priority to the other creditors. It is also submitted that *Re Wiskemann* (e) cited in the judgment has no bearing on the immediate question before the Court.

The Judicial Committee has expressed the opinion that a sale by the Official Assignee of immovable property in the possession of alienees from the insolvent is in substance a sale of the right to litigate, and even if it does not come within the prohibition in sec. 6 (e) of the Transfer of Property Act, 1882, the principle of that enactment applies (e1).

7. *Division of property in specie.*—The Official Assignee or Receiver may, by leave of the Court, divide in its existing form amongst the creditors, according to its estimated value, any property, which from its peculiar nature or other special circumstance, cannot readily or advantageously be sold.

(c) *Guy v. Churchill* (1889) 40 Ch. D. 481; *Sear v. Lawson* (1880) 15 Ch. D. 426.

(d) *In the matter of Purushothamdos and Bros.* (1928) 55 Mad. L. J. 637, 116 I. C. 125, ('29) A. M.

585.

(e) (1923) 92 L. J. Ch. 349.

(e1) *Chokalingam Chetty v. Seethai Acha* (1928) 55 I. A. 7, 6 Rang. 29, 107 I. C. 237, ('27) A. PC. 252.

4. Suits and legal proceedings by and against Official Assignee or Receiver.

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694. Suits relating to insolvent's property.—The causes of action which the Official Assignee or Receiver may enforce by suit or which may be enforced against him as representing the estate of the insolvent fall into three classes, namely, (1) causes of action in suits which at the commencement of the insolvency are pending *by* the insolvent, (2) causes of action in suits which at the commencement of the insolvency are pending *against* the insolvent, and (3) causes of action which are vested in the insolvent at the commencement of the insolvency or which devolve on him after insolvency and before discharge. As to suits by the insolvent pending at the commencement of the insolvency, the Official Assignee or Receiver is entitled to continue them if the cause of action vests in him. As to suits pending against the insolvent, the Official Assignee or Receiver is a necessary defendant if the suit relates to property of the insolvent which has vested in the Official Assignee or Receiver. Causes of action which are vested in the insolvent at the commencement of the insolvency or devolve on him after insolvency and before discharge may be enforced by suit by the Official Assignee or Receiver unless the cause of action is one which does not vest in him (para. 523).

Besides the rights of action mentioned above there are certain rights of action which vest in the Official Assignee or Receiver by virtue of a title superior to that of the insolvent, *e.g.*, the right to set aside voluntary transfers (*f*) or transfers by way of fraudulent preference (*g*). In England such rights are enforced by application under sec. 102 of the Bankruptcy Act, 1914, except where questions of character are involved or the amount at stake is a large one, in which case the matter is left to be decided by the ordinary tribunals (see paras. 59 and 62C). In India it has been held both under the Presidency-towns Insolvency Act (*h*) and under the Provincial Insolvency Act (*i*) that the only legal proceeding by which these rights can be enforced is by application to the Insolvency Court under sec. 7 of the Presidency-towns Insolvency Act or sec. 4 of the Provincial Insolvency Act, as the case may be.

The subject now under consideration may be divided into three parts, namely :—

- (1) Suits by or against the Official Assignee or Receiver.
- (2) Insolvency of plaintiff pending suit.
- (3) Insolvency of defendant pending suit.

695. (1) Suits by or against Official Assignee or Receiver [P.-t. I. A., s. 68 (1) (d) ; Prov. I. A., s. 59 (d)].—Among the property of an insolvent which vests in the Official Assignee or Receiver are certain rights or causes of action mentioned in para. 523 above. The Official Assignee or Receiver is the owner of these rights or causes of action, and he

(f) P.-t. I. A., s. 55 ; Prov. I. A., s. 53.

(g) P.-t. I. A., s. 56 ; Prov. I. A., s. 54.

(h) *Official Assignee, Bombay v.*

Sundarachari (1927) 50 Mad. 776,
102 I.C. 702, (27) A.M. 684.

(i) See para. 64 above.

is entitled to litigate them without the consent of any one (j). To protect the creditors of the estate and also the Official Assignee and Receiver, the Insolvency Acts provide that the Official Assignee or Receiver may, *by leave of the Court*, institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent, and compromise any suit brought by or against him (k). *Leave of the Court, however, is not a condition precedent to the institution or defence of a suit or to the compromise of a suit.* The provision as to leave is intended solely for the protection of the estate, as between the Official Assignee or Receiver and the estate, on matters relating to his costs, charges and expenses, and it affords no defence to any proceedings which the Official Assignee or Receiver, without such leave, may institute against other parties; in other words, an opposing litigant cannot plead in answer to the claim of the Official Assignee or Receiver that he has not obtained the leave of the Court to the institution or defence of the suit (l). The absence of leave does not vitiate any legal proceeding or compromise by the Official Assignee or Receiver (m). The order granting leave may limit the amount of costs to be incurred by the Official Assignee or Receiver (n). If the Official Assignee or Receiver obtains the necessary leave to bring or defend a suit, he is entitled as of right to be paid out of the estate all costs and expenses incurred by him (o). If he proceeds with a suit or defence to a suit without obtaining the leave of the Court, he may lose his right to indemnity out of the estate for the costs incurred by him (p). The power conferred on the Official Assignee or Receiver to institute, defend or continue a suit is confined to cases where the suit relates to the *property* of the insolvent which has vested in him. A suit against the insolvent *for a debt or for damages for breach of contract* is not such a suit, and the Official Assignee or Receiver is neither a necessary nor a proper party to such a suit (q).

Official name.—The title under which the Official Assignee should sue or be sued is "the Official Assignee of the property of A.B. an insolvent" (r). A Receiver under the Provincial Insolvency Act can only sue in his own name.

Suit by creditors in name of Official Assignee on indemnity.—If any of the creditors are desirous that a suit should be brought by the Official Assignee for the benefit of the estate, and he refuses to do so, they may apply to him for leave to use his name on offering him a proper indemnity. If he refuses, they are entitled to apply to the Court for leave to use his name (s).

(j) *Leeming v. Lady Murray* (1879) 13 Ch.D. 123.

(k) P.-t. I. A., s. 68 (1) (d) & (h); Prov. I. A., s. 59 (d) & (h).

(l) *Re Branson* (1914) 2 K.B. 701; *Leeming v. Lady Murray* (1879) 13 Ch.D. 123; *Lee v. Sangster* (1857) 2 C.B. (N.S.) 1; *Laduram v. Nandalal* (1920) 47 Cal. 555, 557, 55 I.C. 747.

(m) *Leeming v. Lady Murray* (1879) 13

Ch.D. 123.

(n) *Re Duncan* (1892) 1 Q.B. 879.

(o) Bombay Rules 182, 183; Madras Rule 133.

(p) See *Re Duncan* (1892) 1 Q.B. 879.

(q) *Subba Ayyar v. Munisami Ayyar* (1927) 50 Mad. 161, 98 I.C. 516, ('26) A.M. 1133.

(r) P.-t. I. A., s. 83.

(s) *Ex parte Kearsley* (1886) 17 Q.B. D. 1.

Paras.
696-699

696. No leave necessary to sue Official Assignee or Receiver.—

No leave is necessary to sue the Official Assignee in respect of a claim made by a third person to property claimed by the Official Assignee as belonging to the estate of the insolvent (*t*). Nor is any such leave necessary to sue the Receiver (*u*).

697. Notice under sec. 80 of C.P.C., 1908.—The Official Assignee is a public officer within the meaning of sec. 80 of the Code of Civil Procedure, 1908, and he is entitled to notice under that section before a suit is filed against him in respect of any act purporting to be done by him in his official capacity (*v*). The same rule applies where a suit is intended to be filed against a Receiver under the Provincial Insolvency Act (*w*). No notice, however, is necessary in the case of a suit by a secured creditor to realise his security, where the Official Assignee or Receiver is joined as a defendant as being a party interested in the equity of redemption. Such a suit is not in respect of any act purporting to be done by the Assignee or Receiver in his official capacity (*x*). It was held in some cases that no notice was necessary if the suit was one to restrain the Official Assignee or Receiver by an *injunction* from selling property claimed by the plaintiff as his own or from doing any other act which might affect the plaintiff's rights in respect of such property (*y*). These cases are no longer law since the decision of the Judicial Committee in *Bhagchand v. Secretary of State* (*z*), where it was held that sec. 80 applied also to suits for an injunction.

698. Notice under O. 21, r. 22, of C. P. C., 1908.—The Official Assignee is a "legal representative" of the insolvent in respect of the insolvent's property vested in him within the meaning of O. 21, r. 22, of the Code of Civil Procedure, 1908. A sale, therefore, of the insolvent's property in execution of a money decree against him without notice to the Official Assignee as required by O. 21, r. 22, is void, and confers no title on the auction purchaser (*a*). The same principle applies in the case of a Receiver. This subject is discussed in paragraph 255 above.

699. (2) Insolvency of plaintiff pending suit.—O. 22, r. 8, of the Code of Civil Procedure, 1908, provides that the insolvency of a plaintiff in any suit *which the Official Assignee or Receiver might maintain*

- (*t*) *Ramalinga Chetty v. Anantachariar* (1913) 24 Mad. L.J. 350, 351, 18 I.C. 722.
- (*u*) *Amrita Lal v. Narain Chandra* (1919) 30 Cal. L.J. 515, 53 I.C. 973; *Sant Prasad Singh v. Sheodat Singh* (1923) 2 Pat. 724, 77 I.C. 589, ('24) A.P. 259; *Maharana Kumar v. E. V. David* (1924) 46 All. 16, 77 I.C. 57, ('24) A.A. 40.
- (*v*) *Joosub v. Kemp* (1902) 26 Bom. 809.
- (*w*) *De Silva v. Govind* (1922) 44 Bom. 895, 58 I.C. 411; *Maharana Kumar v. E. V. David* (1924) 46 All. 16, 77 I.C. 57, ('24) A.A. 40; *Murari Lal v. David* (1924) 47 All. 291, 84 I.C. 739, ('25) A.A. 241 (a suit for a declaration of title

to property advertised by Receiver for sale.)

- (*x*) *Skippers & Co., Ltd. v. David* (1926) 48 All. 821, 99 I.C. 138, ('27) A. A. 132; *Bai Kashi v. Chunilal* (1929) 31 Bom. L. R. 1199.
- (*y*) *Naginal v. Official Assignee* (1912) 37 Bom. 243, 17 I.C. 876.
- (*z*) (1927) 54 I.A. 338, 51 Bom. 725, 104 I.C. 257, ('27) A.P.C. 176, in appeal from (1924) 48 Bom. 87, 90 I.C. 13, ('24) A.B. 1.
- (*a*) *Raghunath Das v. Sundar Das* (1914) 41 I.A. 251, 42 Cal. 72, 24 I.C. 304. For definition of "legal representative," see C.P. C., 1908, s. 2 (11).

for the benefit of his creditors [that is a suit relating to the insolvent's property], will not operate as an abatement of the suit, unless the Official Assignee or Receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct. Where the Official Assignee or Receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the suit to be proved as a debt against the plaintiff's estate (b). The insolvent has no *locus standi* in the matter. The suit being *ex hypothesi* one relating to the insolvent's property, the Official Assignee or Receiver alone can continue the suit (c). Similarly: if the appellant becomes insolvent pending the appeal, and the right of action which he is enforcing is one which vests in the Official Assignee or Receiver, the Assignee or Receiver alone can continue the appeal (c1). If the adjudication is annulled *after the suit is dismissed* under O. 22, r. 8, owing to the neglect or refusal of the Assignee or Receiver to give the security or to continue the suit, and the property has reverted to the plaintiff, the Court may on the plaintiff's application restore the suit (d). If the adjudication is annulled *pending the suit*, and the property has reverted to the plaintiff, he is entitled to continue the suit (d1) [para. 358].

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Costs.—If the Official Assignee elects to continue the suit and becomes a party, he adopts the whole suit as from the commencement, and he may be personally liable for the whole of the costs if he is unsuccessful (e).

700. (3) Insolvency of defendant pending suit.—It is provided by sec. 68 (1) (d) of the Presidency-towns Insolvency Act and the corresponding sec. 59 (d) of the Provincial Insolvency Act that the Official Assignee or Receiver may defend a suit *relating to the property of the insolvent*. O. 22, r. 10, of the Code of Civil Procedure, 1908, provides that in cases of devolution of any interest during the pendency of a suit other than those dealt with by the preceding rules of that Order, the suit may, by leave of the Court, be continued by or against a person to or upon whom such interest has come or devolved. The combined effect of these provisions is that where a defendant becomes insolvent, the suit may be continued against the Official Assignee or Receiver, if the suit relates to the property of the insolvent.

Where a suit is brought against a defendant in respect of a *money demand*, e.g., a debt or damages for breach of contract, and the defendant

- (b) As to insolvency of plaintiff in a representative suit, see *Wolff v. Van Boelen* (1906) 94 L.T. 502.
- (c) *Jackson v. North Eastern Railway Co.* (1877) 5 Ch. D. 844; *United Telephone Co. v. Bassano* (1886) 31 Ch.D. 630.
- (c1) *Surendra Nath v. Tripura Pada* (1927) 32 C. W. N. 304, 109 I. C. 2 2, ('28) A. C. 215; *Subba Ayyar v. Munisami Ayyar* (1927) 50 Mad. 161, 98 I. C. 516, ('28) A.

- M. 1133.
- (d) *Kisan Gopal v. Suklal* (1926) 53 Cal. 844, 98 I. C. 781, ('27) A. C. 76.
- (d1) See *Haji Sajjan v. N. C. Macleod* (1908) 32 Bom. 331, 334 [suit by Offi. Ass.—annulment of adjudication pending suit—insolvent entitled to continue suit].
- (e) See *Watson v. Holliday* (1882) 20 Ch. D. 780, at p. 785; *Abdul Rahiman v. Shaw Wallace & Co.* (1925) 92 I.C. 620, ('25) A.M. 736.

**Paras.
700, 701**

becomes insolvent, the plaintiff is not entitled to join the Official Assignee or Receiver as a party to the suit. The suit is not one relating to the property of the insolvent, and the Official Assignee or Receiver is neither a necessary nor a proper party to the suit. For the same reason the Official Assignee or Receiver is not entitled to defend the suit (f). If a decree is passed in such a suit against the defendant and the defendant appeals and he afterwards becomes insolvent, the Official Assignee or Receiver is not entitled to continue the appeal (g). If a decree is passed in such a suit or appeal against the insolvent, it is not binding on the Official Assignee or Receiver, and he is entitled to contest the validity of the decree as a debt in insolvency proceedings (h). The insolvency court has power to inquire into the consideration even of a judgment debt [para. 434]. The rule, therefore, that the Official Assignee or Receiver is neither a necessary nor a proper party to a suit against the insolvent for debt or for damages for breach of contract or to an appeal from a decree in such a suit, does not cause any prejudice to the estate of the insolvent. If the insolvent dies pending such a suit or appeal, the proper person to be brought on the record is his heir or other legal representative under O. 22, r. 4, of the Code, and not the Official Assignee or Receiver (i).

The Official Assignee may elect to defend a suit relating to the insolvent's property, pending against the insolvent, or he may elect not to defend it. If he elects to defend the suit, he must adopt the whole of it. By electing to defend the suit, he puts himself in the place of the insolvent as regards the suit, and he cannot adopt part of the suit and reject the rest (j). If he refuses to defend the suit, the insolvent is not entitled to defend it independently (k).

Costs.—If the Official Assignee unsuccessfully contests the plaintiff's claim, he may be liable for the whole costs of the suit (l). If, however, he is simply made a party for the convenience of the other parties and submits himself to the order of the Court, he will, in general, not have to pay any costs to any opposite party (m). This is usually provided for by Rules made under the Insolvency Acts.

701. Suits by Official Assignee and insolvent's partners
[P.-t. I. A., s. 98].—Where a partner in a firm is adjudged insolvent, the

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| <p>(f) <i>Barter v. Dubeux</i> (1881) 7 Q.B.D. 413; <i>Greenwood v. Humber & Co.</i> (1899) 6 Mans. 42; <i>Miller v. Budh Singh</i> (1891) 18 Cal. 43; <i>Chandmull v. Ranees Sundery</i> (1895) 22 Cal. 259; <i>Punithavelu v. Bhashyam</i> (1902) 25 Mad. 406, 421; <i>Subba Ayyar v. Munisami Ayyar</i> (1927) 50 Mad. 161, 98 I.C. 516, ('28) A.M. 1133. See also P.-t. I. A., s. 68 (1) (d), and Prov. I. A., s. 57 (d).</p> <p>(g) <i>Subba Ayyar v. Munisami Ayyar</i> (1927) 50 Mad. 161, 98 I.C. 516, ('28) A.M. 1133.</p> <p>(h) <i>Ex parte Anderson</i> (1885) 14 Q.B. D. 606; (1927) 50 Mad. 161, 98</p> | <p>I. C. 516 ('28) A.M. 1133, <i>supra</i>.</p> <p>(i) <i>Chandmull v. Ranees Sundery</i> (1895) 22 Cal. 259.</p> <p>(j) <i>Borneman v. Wilson</i> (1885) 28 Ch. D. 53.</p> <p>(k) <i>Tribhovandas v. Abdulally</i> (1914) 39 Bom. 568, 28 I.C. 506. See <i>United Telephone Co. v. Bassano</i> (1886) 31 Ch.D. 630 (injunction).</p> <p>(l) <i>Watson v. Holliday</i> (1882) 20 Ch.D. 780; <i>Borneman v. Wilson</i> (1885) 28 Ch.D. 53; <i>School Board for London v. Wall Brothers</i> (1891) 8 Mor. 202.</p> <p>(m) See <i>Dansk Røkyliffel Syndikat v. Snell</i> (1908) 2 Ch. 127, at p. 138.</p> |
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Court may authorize the Official Assignee to continue or commence and carry on any suit or other proceeding in his name and that of the insolvent's partner; and any release by the partner of the debt or demand to which the proceeding relates will be void. **Para. 701**

* Where application for authority to continue or commence any suit or other proceeding has been made by the Official Assignee, notice of the application must be given to the insolvent's partner, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the proceeding and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs.

It has been held in England that where one of the partners becomes insolvent, the other partners may sue on a contract made with the firm without joining the insolvent partner. The Official Assignee or Receiver is not a necessary party to the suit, but he may join in the action if authorized to do so by the Insolvency Court. The Official Assignee or Receiver would seem to be a necessary party where the transaction in respect of which the suit is brought was in fraud of the firm, and the fraud was committed by the insolvent partner. Thus if *A* and *B* carry on business in partnership, and *B* in fraud of the partnership endorses a bill of exchange to the defendant in satisfaction of a private debt of his own, the defendant being cognizant of the fraud, and *B* becomes insolvent, the Official Assignee or Receiver must be joined as a party to a suit to recover from the defendant the proceeds of the sale of the bill (*n*). The same principles, it seems, would apply in India (*n1*).

(*n*) *Heilbut v. Nevill* (1870) L.R. 5 C.P. 478.

(*n1*) Compare *Motilal v. Ghellabhai* (1892)

17 Bom. 6 [Right of surviving partners to sue].

II.—DISTRIBUTION OF PROPERTY.

Paras.
702, 703

702. Distribution of dividends [P.-t. I. A., s. 69; Prov. I. A., s. 59].—“The theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man’s property as it stood at that date” (o). It is provided by both the Acts that the Official Assignee or Receiver as the case may be must begin the distribution of dividends *with all convenient speed*.

Under the Presidency-towns Insolvency Act the first dividend must be declared and distributed within one year after the adjudication unless the Official Assignee satisfies the Court that there is sufficient reason for postponing the declaration to a later date, and subsequent dividends must be declared and paid at intervals of not more than six months unless there is sufficient reason for further delay. The Official Assignee must publish in the manner prescribed by the rules notice of his intention to declare a dividend, and must also send reasonable notice of such intention to each creditor mentioned in the insolvent’s schedule who has not proved his debt, and when he has declared a dividend, he must send to each creditor *who has proved* a notice showing the amount of the dividend and when and how it is payable.

No such period is fixed and no such declaration and notice are required *under the Provincial Insolvency Act*. The Madras High Court, however, has framed Rules under the Act providing for notice to be sent, in the form prescribed by the rules, to every creditor who has proved his debt that the distribution of a dividend has been sanctioned (p).

703. Calculation of dividends [P.-t. I. A., s. 71; Prov. I. A., s. 62].—In the calculation and distribution of dividends the Official Assignee or Receiver must retain in his hands sufficient assets to meet the claims of creditors residing in places so distant that they have not had sufficient time to tender their proofs, and also for claims not yet determined (q). He must also make provision for any disputed proofs or claims and for the expenses necessary for the administration of the estate. He is not, however, bound to retain any money in his hands to meet the possible claim of a secured creditor who has neither realized nor valued his security, though he may have notice of the debt (r).

A creditor who has not proved his debt before the declaration of a particular dividend does not thereby lose his right in respect thereof. If there are assets available for distribution after the declaration of that dividend, he is entitled to be paid what he may have failed to receive out of those assets

(o) *Re Savin* (1872) L.R. 7 Ch. App. 760,
764.

(p) Madras Provincial Rule XIX.

(q) *Krishna Chinnmoo v. Maturbhai* (1929)

53 Bom. 290, 117 I.C. 440, (’29)
A. B. 107.

(r) *Re Good* (1880) 14 Ch. D. 82.

before they are applied to the payment of any future dividend, but he cannot disturb the distribution of any dividend declared before his debt was proved, by reason of the fact that he has not participated in it.

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703-706

704. Final dividend [P.-t. I. A., s. 73; Prov. I. A., s. 64].—Under the Presidency-towns Insolvency Act the final dividend is to be declared when the Official Assignee has realised all the property of the insolvent or so much thereof as can, *in his opinion*, be realised without needlessly protracting the proceedings in insolvency. Under the Provincial Insolvency Act it is to be declared when the Receiver has realised all the property of the insolvent or so much thereof as can, *in the opinion of the Court*, be realised without needlessly protracting the receivership. The Official Assignee has no power to declare a final dividend without the leave of the Court. The Receiver, however, may declare such dividend without the leave of the Court except in Madras where such leave is necessary under the Rules (s). Before declaring the final dividend, the Official Assignee or Receiver must give notice in the manner prescribed to the persons whose claims to be creditors have been notified but not proved that, if they do not prove their claims to the satisfaction of the Court within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court on application by any such claimant grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent must be divided, under the Presidency-towns Insolvency Act among the creditors who have proved their debts, and under the Provincial Insolvency Act among the creditors entered in the schedule framed under sec. 33 of that Act, without regard to the claims of any other persons.

705. Notice of final dividend.—Notice of a final dividend must be given not only to the creditors who have themselves notified their claims, but also to the creditors whose claims have been notified in the insolvent's schedule (t). The mere fact that a creditor was aware that a final dividend was about to be declared is no reason for not giving the notice to him (u). The notice must specify the date within which claims have to be proved. A notice requiring the creditors to prove their claims "as soon as possible" is not a good notice (v).

706. When declaration of dividend may be set aside.—Where a creditor has lodged his proof, but through oversight in the office of the Official Assignee his name is not included in the list of creditors and no notice of dividend is given to him, the declaration of dividend may be set aside, and

(s) See Madras Provincial Rule XIX.

(t) *Re Sunderji Bhimji* (1928) 107 I. C. 439, ('28) A. S. 105.

(u) *Venkatarayana Chetty v. Sevugan Chetty* (1924) 47 Mad. 916, 80 I. C.

620, ('24) A. M. 769.

(v) *Krishna Chinmoo & Sons v. Matubhai* (1929) 53 Bom. 290, 299, 117 I. C. 440, ('29) A. B. 107.

**Paras.
706-709**

the creditors who have received dividends may be ordered to repay the excess of the dividends which have been paid to them over and above the amount which they may be entitled to receive in common with the other creditors (*w*). The same course will be adopted if omission to give notice to a creditor was due to a mistake on the part of the Official Assignee, if the mistake was which one could be excused (*x*). If the case is one of gross negligence on the part of the Official Assignee, he may be ordered personally to pay to the creditor the amount lost to him (*y*). Where a declaration of dividend is set aside, fresh notices must be given as provided by the Acts. Where a declaration is set aside, the Court will allow a creditor whose claim was not notified to the Official Assignee to come in and prove, and his name may be included in the list of creditors in which case he is entitled to share rateably with all other creditors. This proceeds on the ground that where a declaration is set aside, there is no valid declaration at all of dividend (*z*).

707. Lapse of time no bar to proof.—The leading case on the subject is *ReMcMurdo* (*a*). In that case Vaughan Williams, L.J., said: "Now, according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose; and, of course, in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the Court. If that is so, leave must be granted upon such terms as the Court may think just."

708. Dividend not a debt.—A dividend is not a debt, and it cannot therefore be attached under O. 21, r. 46, of the Code of Civil Procedure, 1908, by a garnishee notice (*b*).

709. Assignee of dividend.—Dividends are to be distributed among the creditors who have proved their debts. An assignee of a dividend is not such a creditor. He cannot therefore compel the Official Assignee or Receiver to pay the dividends to him, but he may claim from the assignor the dividends when received, or may apply to the Court to give leave to the Official Assignee or Receiver to admit a proof by him in substitution

- (*w*) *Re Ramchandra Ganuji Waiker* (1927) 29 Bom. L. R. 1167.
- (*x*) *Krishna Chinnoo & Sons v. Matubhai* (1929) 53 Bom. 290, 117 I. C. 440, ('29) A. B. 107.
- (*y*) *Re Archibald Gilchrist Peace* (1921) 26 C. W. N. 653, 70 I. C. 507, ('21) A. C. 771.
- (*z*) *Re Ramchandra Ganuji Waiker* (1927) 29 Bom. L. R. 1167.

- (*a*) (1902) 2 Ch. 684, 699; *Re Ramchandra Ganuji Waiker* (1927) 29 Bom. L. R. 1167; *Sivasubramania v. Theethiappa* (1924) 47 Mad. 120, 75 I. C. 572, ('24) A. M. 163; *Babu Lal Sahu v. Krishna Prasad* (1925) 4 Pat. 128, 85 I. C. 543, ('25) A. P. 438.
- (*b*) *Prout v. Gregory* (1889) 24 Q. B. D. 281.

for that of his assignor (c). The Official Assignee or Receiver, however, is entitled to retain the dividends against the assignee to satisfy costs which the assignor has been ordered to pay to him (d). Paras. 709-714

710. Reduction of proof.—A creditor whose proof is reduced after he has received dividends on the footing of his original proof is not entitled to participate in any future dividends in respect of his reduced proof without giving credit for the overpayment in respect of his original proof. This proceeds on the well known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payments out of the common fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary (c). The creditor, however, is entitled to retain the dividends already received, the reduction affecting only the right to receive future dividends (f).

711. Dividend payable to the estate of a deceased person.—Where the debt due to a deceased Hindu is proved by his widow, she is entitled to be paid the dividends though no representation has been taken out by her to the estate of the deceased. The provisions of sec. 214 of the Indian Succession Act, 1925, do not apply to such a case (g).

712. Joint and separate dividends [P.-t. I. A., s. 70].—Where one partner in a firm is adjudged insolvent, a creditor to whom the insolvent is indebted jointly with the other partners in the firm or any of them is not entitled to receive any dividend out of the separate property of the insolvent until all the separate creditors have received the full amount of their respective debts.

There is no such section in the Provincial Insolvency Act, but the same principle will apply.

713. No suit for dividend [P.-t. I. A., s. 74; Prov. I. A., s. 65].—No suit lies against the Official Assignee or Receiver for a dividend, but if he refuses to pay any dividend the Court may order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld and the costs of the application.

714. Management by and allowance to insolvent [P.-t. I. A., s. 75; Prov. I. A., s. 66].—The Official Assignee may appoint the insolvent himself to superintend the management of the property of the insolvent or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property on such terms as the Official Assignee may direct. This power is given under the Provincial Insolvency Act to the Court. Under both the Acts the Court may, from time

(c) *Re Frost* (1899) 2 Q.B. 50.

(d) *Re Mayne* (1907) 2 K.B. 899.

(e) *Re Searle* (1924) 2 Ch. 325.

(f) *Ex parte Harper* (1882) 21 Ch. D.

537.

(g) *Omayachi v. Rama Chandra Iyyar* (1926) 49 Mad. 952, 97 I.C. 411, (26) A.M. 899.

**Paras.
714-716**

to time, make such allowance as it thinks just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his estate, but any such allowance may at any time be varied or determined by the Court.

715. Right of insolvent to surplus [P.-t. I. A., s. 76 ; Prov. I. A., s. 67].—The insolvent is entitled to any surplus remaining after payment in full of his creditors, with interest, as provided by the Acts and of the expenses of the proceedings taken thereunder.

Assignment of surplus.—The insolvent may assign the surplus or dispose of it by will to any person even before it is known whether there will be a surplus. Such an assignment is valid against the Official Assignee or Receiver in a second bankruptcy (*h*). This, however, does not entitle either the insolvent or his assignee to interfere in the administration of the estate (*i*).

Surplus after distribution under composition.—Where the creditors agree to a composition upon the terms that the estate of the insolvent should be transferred to a third person, and that such person should guarantee payment of the composition, and the transfer is made and the guarantee given, and the order of adjudication is annulled, the surplus after payment in full to the creditors belongs not to the transferee, but to the insolvent (*j*).

715A. Attachment of surplus.—The surplus in the hands of the Official Assignee or Receiver may, it seems, be attached in execution of a decree against the insolvent (*k*).

716. Estate administered in two countries.—A creditor who receives any part of the property of the insolvent which is situate in a foreign country will not be allowed to prove under an insolvency in British India, unless he brings into the common fund what has been received by him. Thus where an insolvent possesses properties, some situate in this country and some situate outside it, and there has been a petition for adjudication in this country followed by proceedings in insolvency outside British India, and a foreign Court takes possession of the foreign property and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the adjudication in British India, except on the condition of first accounting for what they have received in the foreign bankruptcy. To hold otherwise would be to allow double proof in respect of the same estate (*l*). If, however, the creditor has recovered property under the

(*h*) *Bird v. Philtopp* (1900) 1 Ch. 822 ;
Ramchandra v. Nipunge (1923)
25 Bom. L. R. 499, 73 I.C. 379,
(24) A. B. 49.

(*i*) *Ex parte Sheffield* (1879) 10 Ch. D.
434.

(*j*) *Subbaraya v. Vythilinga* (1893) 16
Mad. 85.

(*k*) *Re Prior* (1921) 3 K.B. 333.

(*l*) *Banco De Portugal v. Waddell* (1880)
5 App. Cas. 161 ; *Ex parte Wilson*
(1872) L.R. 7 Ch.App. 490 ; *Selkrigg*
v. Davies (1814) 2 Dow. 230, 249,
3 E. R. 848, 854 ; *Yokohama*
Specie Bank, Ltd. v. S. Curlender
& Co. (1926) 43 Cal. L. J. 436, 96
I. C. 459, (26) A.C. 898.

judgment of a foreign Court delivered with knowledge of insolvency in British India, the Official Assignee cannot by a suit in this country compel him to refund the value of the property thus recovered (o).

**Paras.
716-720**

717. Insolvency Rules as to dividends.—As to Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 129-131, Madras Rules 86-98, Bombay Rules 122-124, and Rangoon Rules 195-198A. As to Rules under the Provincial Insolvency Act, see Calcutta Rule 29, Madras Rule XIX, Bombay Rules XXI-XXII, and Allahabad Rule 33.

718. Unclaimed dividends [P.-t. I. A., ss. 122, 123].—Where the Official Assignee has under his control any dividend which has remained unpaid for fifteen years from the date of declaration or such less period as may be prescribed, he must pay the same to the account and credit of the Government of India, unless the Court otherwise directs. Any person claiming to be entitled to any moneys so paid may apply to the Court for an order for payment to him of the same.

719. Insolvency Rules as to unclaimed dividends.—As to Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 174-176; Madras Rules 96-98, 139, 144; Bombay Rule 178; Rangoon Rules 206-209.

720. Committee of inspection [P.-t. I. A., ss. 88, 89; Prov. I. A., s. 67A].—Under the Presidency-towns Insolvency Act the Court may, if it so thinks fit, authorize the creditors who have proved to appoint from among the creditors or holders of general proxies or general powers-of-attorney from such creditors a committee of inspection for the purpose of superintending the administration of the insolvent's property by the Official Assignee; provided that a creditor, who is appointed a member of a committee of inspection, shall not be qualified to act until he has proved. The committee will have such powers of control over the proceedings of the Official Assignee as may be prescribed.

Under the Provincial Insolvency Act also the Court may appoint a committee of inspection. The committee is to be appointed from among creditors who have proved or persons holding general powers-of-attorney from such creditors. This provision was added into the Provincial Insolvency Act by Act 39 of 1926.

Rules relating to committees of inspection.—As to rules under the Presidency-towns Insolvency Act, see Calcutta Rules 179-196, Madras Rules 56-58, Bombay Rules 184-186, and Rangoon Rule 222.

(o) See *Cockrell v. Dickens* (1840) 2 M.I.A. 353, 18 E. R. 334; *Yokohama Specie Bank, Ltd. v. S. Curlender & Co.* (1926) 43 Cal.

L. J. 436, 96 I. C. 459, ('26) A. C. 898. As to foreign judgments, see C.P.C., 1908, s. 13.

III.—PENALTIES.

Para. 721

721. **English law.**—Bankruptcy proceedings under the earlier bankruptcy laws were in the nature of criminal proceedings. By two statutes passed in the reign of Queen Anne (*p*), a bankrupt who did not surrender himself to the commissioners or did not make a full discovery of his property or did not deliver his goods, effects and estate to them, was liable to the penalty of death “as a felon without the benefit of clergy”. By the statute 6 Geo. 4, c. 16, it was provided that if the bankrupt failed to surrender himself or to disclose or deliver his property, he should be deemed guilty of felony and should be liable to transportation for life or for a term not less than seven years, or to imprisonment with or without hard labour for any term not exceeding seven years. By the Bankruptcy Act, 1849, certain offences, namely, falsification of books (*q*), obtaining goods on credit on the eve of bankruptcy under the false pretence of carrying on business in the ordinary course of trade (*r*), and giving false evidence in his examination (*s*), were made misdemeanours punishable by imprisonment, but the two offences mentioned above, namely, failure on the part of the bankrupt to surrender himself and failure to deliver his property, continued to be treated as felony. By the same Act the Bankruptcy Court was empowered to direct the assignees to institute, and, on their failing to do so, the official assignee to institute, a prosecution for the offence with which the bankrupt was charged (*t*). If the bankrupt was found guilty, further protection from arrest was refused, and the certificate of conformity (corresponding to discharge under the modern law) was either refused or suspended (*u*). By the Bankruptcy Act, 1861, sec. 159, power was given to the Bankruptcy Court to try the offences which were misdemeanours or to direct the bankrupt to be indicted and prosecuted in one of the ordinary Courts of criminal justice.

By the Bankruptcy Act, 1869, the Court of Bankruptcy was divested of the power to try a bankrupt for any bankruptcy offence, and such offences were to be tried by the ordinary criminal Courts. At the same time provisions relating to the punishment of fraudulent debtors were transferred to a new Act known as the Debtors Act, 1869, which provided for the punishment of fraudulent debtors. The penal provisions of the Debtors Act were extended in certain respects by sec. 163 of the Bankruptcy Act, 1883. Power was also given to the Bankruptcy Court by sec. 165 of that Act to commit a bankrupt for trial. Sec. 11 of the Debtors Act which contained the penal provisions was amended by the Bankruptcy and Deeds of Arrangement Act, 1913. The section as amended was reproduced in the Bankruptcy Act, 1914, sec. 154. All bankruptcy offences under the present English law are misdemeanours (*v*) except one which is a felony. That

(*p*) 4 Ann. c. 17, s. 1; 5 Ann. c. 22, s. 1.

(*q*) B.A. 1849, s. 252.

(*r*) B.A. 1849, s. 253.

(*s*) B.A. 1849, s. 254.

(*t*) B.A. 1849, s. 255.

(*u*) B.A. 1849, s. 256.

(*v*) B.A. 1914, ss. 154-158.

offence consists in quitting or attempting to quit England with property to the amount of twenty pounds or upwards (*w*).

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721-723**

722. Insolvency offences under the Indian law.—The offences which an insolvent may commit fall into two classes, namely,—

1. Offences which can only be committed by an insolvent. These offences are punishable under the Insolvency Acts. They may be sub-divided into—
 - (a) offences by any person who is adjudged insolvent, whether he has obtained his discharge or not, referred to in sec. 103 of the Presidency-towns Insolvency Act and in sec. 69 of the Provincial Insolvency Act;
 - (b) offences by an undischarged insolvent referred to in sec. 102 of the Presidency-towns Insolvency Act and in sec. 72 of the Provincial Insolvency Act.

2. Offences which can be committed by an insolvent or any other person. These offences are specified in secs. 421 to 424 of the Indian Penal Code.

723. 1 (a) Offences which can be committed by any person who is adjudged insolvent [P.-t. I. A., s. 103 ; Prov. I. A., s. 69].—These offences are enumerated in sec. 103 of the Presidency-towns Insolvency Act and in sec. 69 of the Provincial Insolvency Act. There is one offence referred to in sec. 69 (a) of the Provincial Insolvency Act, namely, wilfully failing to perform the duties imposed on the insolvent by that Act, which is not mentioned in sec. 103 of the Presidency-towns Insolvency Act. The reason is that the same offence, as will be presently seen, is dealt with in the Presidency-towns Insolvency Act in another part of that Act.

A person who is adjudged insolvent is guilty of an offence in each of the following cases :—

- (1) If he *fraudulently with intent* to conceal the state of his affairs or to defeat the objects of the Acts,—
 - (i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any books, paper or writing relating to such of his affairs as are subject to investigation under the Acts, or
 - (ii) has kept or caused to be kept false books, or
 - (iii) has made false entries in, or withheld entries from, or wilfully altered or falsified, any book, paper or writing relating to such of his affairs as are subject to investigation under the Acts, or

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- (2) If he *fraudulently with intent* to diminish the sum to be divided among his creditors or to give an undue preference to any of the said creditors,
- (i) has discharged or concealed any debt due to or from him, or
 - (ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever.

If the insolvent commits any of the above offences he is liable to be punished, under the Presidency-towns Insolvency Act with imprisonment for a term which may extend to two years, and under the Provincial Insolvency Act with imprisonment for a term which may extend to one year.

724. Failure to perform duties imposed upon insolvent.—As already seen, there are certain duties imposed upon the insolvent by both the Acts. Under the Presidency-towns Insolvency Act these duties are prescribed by sec. 33. Under that section failure to perform any of those duties is a contempt of Court and the insolvent is punishable with imprisonment for contempt. Chartered High Courts alone have the power to commit for contempt; other Courts have no such power. The Court of the Judicial Commissioner of Sind is not a Chartered High Court, but express power to commit for contempt is given to that Court by sec. 90 (8) of the Presidency-towns Insolvency Act.

The duties to be performed by an insolvent under the Provincial Insolvency Act are laid down in sec. 22 of that Act. The insolvent is also under a duty to deliver all his property to the Receiver. The Courts exercising jurisdiction under the Provincial Insolvency Act having no power to commit for contempt, failure to perform those duties is included as an offence in sec. 69 of the Act. Under sub-sec. (a) of that section if the insolvent fails to perform the duties imposed on him by sec. 22 or to deliver possession of any part of his property which is divisible among his creditors (x), he is liable to the punishment prescribed by sec. 69. One of the duties laid upon the insolvent by sec. 22 is to give an inventory of his property. If he *wilfully* fails to disclose any item of his property, it is an offence under sec. 69, but failure to disclose arising from negligence or mistake is not an offence (y).

725. Withholding or preventing production of books or documents.—A debtor cannot be convicted of the offence of withholding books or documents unless it is proved that the books exist (z). Where the books exist, but the debtor refrains from delivering them to the Official Assignee or Receiver with intent to conceal the state of his affairs, the offence is complete

(x) See Prov. I. A., s. 28.

(y) See *Karim Bakhsh v. Mieri Lal* (1885) 7 All. 295, and *Sukrit Narain Lal v. Raghunath Sahai* (1885) 7 All. 445, both cases

under the Insolvency Chapter of the Code of Civil Procedure, 1882.

(z) *J. M. Lucas v. Official Assignee of Bengal* (1919) 24 C.W.N. 418, 56 I. C. 577.

even if the Official Assignee or Receiver *subsequently* comes into possession thereof, e.g., after a search in the debtor's house (a). Removing a book or a document is a mode of "preventing" its production within the meaning of the section (b).

726. Omission to make entries.—Where a business is carried on in partnership, and one of the partners is charged with the offence of fraudulently omitting to make entries in the books, it must be proved that the offence was committed by the partner charged with the offence (c).

727. Giving undue preference.—Merely giving undue preference is not an offence. To constitute it an offence it must be shown that it was done fraudulently with intent to diminish the sum to be divided amongst the other creditors (d).

728. Fraudulently making away with property.—Where an insolvent takes the Official Assignee or Receiver to the place where his goods are stored, and points out the goods to him, and the goods subsequently disappear, the presumption is that the insolvent has made away with the goods and he is liable to be convicted unless he gives a satisfactory explanation (e).

729. Burden of proof.—The offences enumerated above fall under two heads. The feature common to the offences under the first head (para. 723) is that the act must have been done fraudulently with intent to conceal the state of the debtor's affairs or to defeat the objects of the Act, namely, the realization of the debtor's estate and its distribution amongst the creditors. This does not necessarily involve an intent to defraud the creditors, for a debtor may conceal the state of his affairs without any such intent, being actuated solely by a desire not to make his affairs known to others. Again the debtor may intend to defeat the objects of the Act so far as it may affect him personally without any intention to deal unfairly with his creditors. The feature common to the offences under the second head (para. 723) is that the act complained of must have been done fraudulently with intent to diminish the sum to be divided among the creditors or to give an undue preference to any of the creditors. It will be noticed that the words "fraudulently with intent to" occur in both heads. The burden of proof in cases under both heads is on the prosecution. In England all that the prosecution has to prove is the act or omission complained of, and the onus rests upon the debtor to prove that he had no intent to defraud or that he did not mean to conceal the state of his affairs or to defeat the law (f). This proceeds on the

(a) *Joseph Perry v. Official Assignee of Calcutta* (1920) 47 Cal. 254, 259, 56 I. C. 778.

(b) (1920) 47 Cal. 254, 56 I. C. 778, *supra*.

(c) *Ganga Prasad v. Madhuri Saran* (1927) 25 All. L. J. 331, 100 I.C.

550, (27) A. A. 352.

(d) *J. M. Lucas v. Official Assignee of Bengal* (1919) 24 C.W.N. 418, 56 I. C. 577.

(e) *In the matter of Qasim Ali* (1921) 43 All. 406, 64 I.C. 37, (21) A.A. 87.

(f) See B.A. 1914, s. 154.

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729, 730**

principle that the debtor is in a position to know all facts which go to prove his innocence and it is therefore for him to prove those facts. This, it is submitted, is a sound principle, and it is in accordance with the provisions of sec. 106 of the Indian Evidence Act, 1872. That section says that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. The same rule, it is submitted, should be applied to insolvency offences in India. But it is a matter for the Legislature.

730. When the offence must have been committed.—Under the Provincial Insolvency Act, the offence may have been committed, “whether before or after the making of an order of adjudication.” These words do not occur in sec. 103 of the Presidency-towns Insolvency Act, but the effect is the same (*g*). The corresponding English section (sec. 154) of the Bankruptcy Act, 1914, is more specific in this respect. Taking the offences mentioned in the Indian Acts the position as to the corresponding offences in the English Act seems to be this, that the offence of preventing the production of books or documents must have been committed after the presentation of a bankruptcy petition by or against the debtor (*h*), while the offence of destroying books or documents (*i*), making false entries in books or falsifying books (*j*), concealing debts due to the debtor (*k*), and fraudulently removing any part of the property to the value of ten pounds or upwards (*l*), must have been committed after the presentation of a bankruptcy petition or within twelve months next before such presentation. Keeping false books which is an offence under the Indian Acts is not specifically mentioned in the English Act.

The penalty sections in both the Indian Acts are based on secs. 11 and 13 of the Debtors Act, 1869. That Act prescribed certain time limits. Those time limits have not been reproduced in the Indian Acts, probably because the Indian Legislature thought that it was best to leave it to the Court itself in each case to determine such limit. But though no time limit has been specified, it has been provided, as regards the offence of destroying or withholding documents and the offence of making false entries and withholding entries, that they should “relate to *such of the affairs of the debtor* as are subject to investigation under the Act”, thereby indicating the limits beyond which the Court cannot go (*m*). Similar words also occur in some parts of sec. 154 of the Bankruptcy Act, 1914.

(*g*) *Joseph Perry v. Official Assignee of Calcutta* (1920) 47 Cal. 254, 259, 56 I. C. 778.

(*h*) B.A. 1914, s. 154 [(1)] (8).

(*i*) B.A. 1914, s. 154 [(1)] (9).

(*j*) B.A. 1914, s. 154 [(1)] (8) and (9).

(*k*) B.A. 1914, s. 154 [(1)] (4).

(*l*) B.A. 1914, s. 154 [(1)] (5).

(*m*) *Ganga Prasad v. Madhuri Saran* (1927) 25 All. L. J. 331, 100 I.C. 550, (‘27) A.A. 352.

731. Effect of offences on discharge.—Under the Presidency-towns Insolvency Act, sec. 39, the Court is absolutely bound to refuse a discharge if the insolvent has committed any offence punishable under sec. 103 of that Act or under secs. 421 to 424 of the Indian Penal Code. There is no such provision in the Provincial Insolvency Act.

The offences punishable under sec. 103 of the Presidency-towns Insolvency Act and sec. 69 of the Provincial Insolvency Act are known as “major offences” as distinguished from the offences referred to in sec. 39 (2) of the Presidency-towns Insolvency Act and in sec. 42 (1) of the Provincial Insolvency Act, which are known as “minor offences” (u). The only penalty for the minor offences is that if any of those offences is proved the Court is bound to refuse an immediate unconditional discharge.

732. Complaint by Court [P.-t. I. A., s. 104; Prov. I. A., s. 70].—Where the Court is satisfied, after such preliminary inquiry, if any, as it thinks necessary, that there is ground for inquiring into any offence referred to in the penalty section and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing, under the Presidency-towns Insolvency Act to a Presidency Magistrate or a Magistrate of the first class having jurisdiction, and under the Provincial Insolvency Act to a Magistrate of the first class having jurisdiction, and such Magistrate must deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898. Under the Presidency-towns Insolvency Act, the complaint may be signed by such officer of the Court as the Court may appoint in that behalf. Under the Provincial Insolvency Act, it must be signed by the Judge.

733. Changes in the law.—Under the Presidency-towns Insolvency Act insolvency offences were tried by the Insolvency Court itself under sec. 104 of that Act until the section was amended in its present form by sec. 9 of the Insolvency (Amendment) Act, 1926, (Act IX of 1926).

Under the Provincial Insolvency Act, 1907, also insolvency offences were tried by the Insolvency Courts. The Provincial Insolvency Act, 1920, introduced a change on the lines of the Bankruptcy Act, 1861 [para. 721]. By sec. 70 of that Act the Insolvency Court was empowered either to try such offences itself or to make a complaint to the nearest Magistrate of the first class having jurisdiction, in which case the offence was to be tried by the Magistrate in the manner prescribed by the Code of Criminal Procedure, 1898. Sec. 70 of the Act of 1920 consisted of five sub-sections. Sec. 70 in its present form was substituted for sub-secs. (1), (2) and (3) by sec. 11 (c) of the Insolvency (Amendment) Act, 1926. Sub-secs. (4) and (5) were left untouched by an oversight. They were subsequently repealed,

(u) See *Re Bottomley* (1893) 10 Morr. 262, 269-270.

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when the mistake was discovered, by the Repealing and Amending Act, 1927.

The result is that the practice under both the Acts was brought into conformity with the English practice. This was done pursuant to a suggestion of the Civil Justice Committee. In its report the Committee says (o) : " As regards the criminal offences created by the Act of 1920, these are in substance the same as those created by the Presidency Act of 1909. In practice the procedure whereby the insolvency judge takes upon himself the duties of a magistrate trying a warrant case, has in the past been highly unsatisfactory. The prosecution is in the hands of the Official Assignee or of the creditor. It has been laid down that the charge as ultimately framed must correspond with the notice originally issued to the insolvent by the Court. By the Act of 1920, however, section 70, sub-section 5, the Insolvency Court instead of proceeding itself to try the case, as a warrant case tried by a magistrate, may make a complaint to the nearest first class magistrate, who may deal with the complaint in the ordinary course of criminal justice. Powers similar to these should be introduced into the Presidency-towns Insolvency Act by an amendment of section 104. We think, moreover, that the necessity for notice to the insolvent might well be discarded altogether, and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the Bankruptcy Court, without consulting the bankrupt on the subject, the bankrupt having plenty of time and opportunity to say what he has to say when he is arraigned before the Criminal Court. The simplest form of arrangement would seem to be that the receiver or, if he refuses, a creditor should be given power to apply to the Court *ex parte* for an order of prosecution and that thereupon prosecution should be commenced and carried on by the Local Government through such officer as it may appoint for the purpose. In England it is the duty of the Director of Public Prosecutions to institute and carry on the prosecution ; he can abandon it if he thinks on investigation that the case cannot be proved ; the insolvent is only concerned with the proceedings as any ordinary accused is concerned with criminal proceedings against him, namely, to defend them when they have been instituted."

734. Preliminary inquiry.—Under the section in both the Acts as it stood before the amendment it was incumbent upon the Court to give notice to the insolvent to show cause why a charge or charges should not be framed against him. No such notice is necessary under the amended section, and the Court may make the order *ex parte*. All that is required is that the Court should be satisfied that there is ground for inquiring into an offence referred to in the penalty section and appearing to have been

committed by the insolvent. The Court is not bound to make any preliminary inquiry. If it decides to make one, it may make such inquiry as it thinks necessary in order to satisfy itself that there is ground for inquiring into the offence or offences. The Court may satisfy itself in any way it thinks proper on the facts of each particular case as to the propriety of ordering prosecution (p). For this purpose it may take into consideration the report of the Official Assignee or of the Receiver (q), but the report cannot be treated as evidence of the facts stated therein (r). An application under these sections may be made by the Official Assignee or Receiver, and, if he refuses, by a creditor. The Presidency-towns Insolvency Act imposes a duty upon the Official Assignee to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct or as may be prescribed (s). There is no such statutory duty imposed upon the Receiver under the Provincial Insolvency Act.

735. At what stage preliminary inquiry to be held.—An order for prosecution need not be deferred until the hearing of the application for discharge, and the Court may hold a preliminary inquiry at any time after adjudication. As a general rule the inquiry is not held until the application for discharge is heard except in very clear cases (u). In England an order for prosecution is to be made only if it appears to the Court that there is a reasonable probability that the debtor will be convicted, and that the circumstances are such as to render a prosecution desirable (v).

736. Commitment to High Court Sessions.—Under sec. 104 of the Presidency-towns Insolvency Act, read with sec. 254 of the Code of Criminal Procedure, 1898, a commitment to the *High Court Sessions* for an offence referred to in sec. 103 of the Insolvency Act is illegal, such a case being a warrant case punishable with rigorous imprisonment for not more than two years (w).

737. 1(b) Offence by undischarged insolvent [P-t. I. A., s. 102 ; Prov. I. A., s. 72].—Under both the Acts an undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

- (p) *Jewraj Khariwal v. Dayal Chand Jahury* (1928) 55 Cal. 783, 111 I. C. 372, ('28) A. C. 211.
(q) *Jewraj Khariwal v. Dayal Chand Jahury* (1928) 55 Cal. 783, 791, 111 I.C. 372, ('28) A.C. 211; *Monmohon Roy v. Hemanta Kumar Mookerjee* (1916) 23 Cal. L. J. 553, 34 I.C. 777.
(r) *Abdul Khader Sahib v. Official Assignee of Madras* (1913) 25

- Mad. L. J. 320, 20 I.C. 482.
(s) P.-t. I. A., s. 79 (2) (c).
(u) See the observations of Jenkins, C. J., in *J. M. Lucas v. Official Assignee of Bengal* (1919) 24 C.W.N. 418, 424, 56 I.C. 577.
(v) B.A. 1914, s. 161.
(w) *Emperor v. Girish Chandra Kundu* (1929) 56 Cal. 785, 120 I. C. 813, ('29) A. G. 777.

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Under the Provincial Insolvency Act, where the Court has reason to believe that an undischarged insolvent has committed the offence of obtaining false credit, the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate; and may bind over any person to appear and give evidence on such trial.

738. Undischarged insolvent obtaining credit.—The obligation imposed by the section on an undischarged bankrupt to disclose his position to the person from whom he seeks credit is absolute. It is no defence that he took steps to have such information conveyed, or that he had reasonable grounds to believe that it had been conveyed, if in fact it had not. Thus if an undischarged insolvent buys goods on credit through an agent, and the agent does not inform the seller that he is purchasing the goods for an undischarged insolvent, the insolvent is liable to conviction even if he had instructed the agent to convey the information to the seller. The object of the section is to protect the person from whom the insolvent seeks to obtain credit. That person is not protected unless disclosure is made to him of the fact that the person obtaining credit is an undischarged insolvent. If the insolvent took steps to give the information and had reasons to believe that the information was conveyed, that matter may be taken into account in assessing the punishment to be imposed, but it has no bearing on the question whether or not the offence has been committed (x). An intent to defraud is not a material ingredient of the offence created by the section (y). Nor is it necessary that there should be a stipulation to grant credit in the contract between the parties; it is sufficient if a credit in fact is obtained (z). If the insolvent sends an order for goods of a less value than Rs. 50, but goods of a value of Rs. 50 or upwards are sent to him and he receives and keeps the goods, he is guilty of the offence though the order was for less (a).

739. Jurisdiction of Magistrates.—An undischarged insolvent who is adjudged insolvent under the *Provincial Insolvency Act* cannot be proceeded against for the offence of obtaining credit under sec. 102 of the *Presidency-towns Insolvency Act*. Thus where a person who was adjudged insolvent by the District Court of Hooghly bought goods on credit without informing the seller that he was an undischarged insolvent, it was held that he could not be tried by a Presidency Magistrate of Calcutta. The reason is that the word "insolvent" in sec. 102 of the *Presidency-towns Insolvency Act* means a person adjudged insolvent under that Act (b). Moreover,

(x) *Rex v. Duke of Leinster* (1924) 1 K. B. 311.

(y) *The Queen v. Dyson* (1894) 2 Q.B. 176.

(z) *Queen v. Peters* (1886) 16 Q.B.D. 636.

(a) *Reg. v. Juby* (1887) 55 L. T. 788.

(b) *Ashutosh Ganguli v. Watson* (1926) 53 Cal. 929, 98 I. C. 116, ('27) A. C. 149.

the penalty prescribed by the two Acts is different, the maximum penalty under the Presidency-towns Insolvency Act being imprisonment for a term which may extend to two years and that under the Provincial Insolvency Act being imprisonment for a term which may extend to one year.

Complaint by private person under Provincial Insolvency Act.—A Magistrate has no jurisdiction in cases under the Provincial Insolvency Act to try the offence of obtaining credit unless the case is sent to him for trial by the Insolvency Court. He cannot try the case on a complaint made by a private individual, not even if such individual be the injured person. If he does so, and the insolvent is convicted, the conviction and sentence must be set aside (c).

740. 2 Offences which can be committed by the insolvent or others.—There are certain offences which may be committed not only by a debtor who is adjudged insolvent, but also by any other person. These offences are defined in secs. 421 to 424 of the Indian Penal Code (cl). Sec. 421 deals with fraudulent removal, concealment or transfer of property by a person, without adequate consideration, with intent to prevent the distribution thereof according to law among his creditors. Sec. 422 deals with the case of a person who fraudulently prevents any debt due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person. Sec. 423 relates to instruments of transfer containing false statements relating to the consideration for the transfer or relating to the person for whose use it is really intended to operate. Sec. 424 relates to the offence of dishonestly releasing any demand or claim to which a person is entitled.

741. Offences which can be committed by any person other than the bankrupt.—Under the English law there are two bankruptcy offences which by their very nature could only be committed by a person other than the bankrupt. They are specified in sec. 154 (3) and sec. 160 of the Bankruptcy Act, 1914. Sec. 154 (3) provides for the case of a person who receives in pawn or pledge or otherwise property which has been pledged or disposed of by the insolvent, knowing that such property was obtained by the insolvent on credit by fraud. Sec. 160 provides for the case of a creditor or any person claiming to be a creditor in a bankruptcy proceeding making any false claim or any proof, declaration or statement of account, which is untrue in any material particular.

742. Criminal liability after discharge or composition [P.-t. I. A., s. 105 ; Prov. I. A., s. 71].—An order of discharge releases

Para. 742 the insolvent from *civil* liability to the extent mentioned in the Acts (d). So too does the approval of a composition or scheme of arrangement by the Court (e). It does not, however, release the insolvent from *criminal* liability for insolvency offences. Under the Presidency-towns Insolvency Act, he remains liable for the offences mentioned in secs. 102 and 103 of the Act. Under the Provincial Insolvency Act, he is liable for the offences mentioned in sec. 69 of that Act, but not for the offence mentioned in sec. 72 of obtaining credit without disclosing that he is an undischarged insolvent.

(d) P.-t. I. A., s. 46 ; Prov. I. A., s. 44. | (e) P.-t. I. A., s. 30 ; Prov. I. A., s. 39.

IV. SMALL INSOLVENCIES.

743. Summary administration in small insolvencies [P.-t. I. A., Para. 743 s. 106 ; Prov. I. A., s. 74].—Where the property of an insolvent is not likely to exceed in value, under the Presidency-towns Insolvency Act, Rs. 3,000 or such other less amount as may be prescribed, and under the Provincial Act, Rs. 500, the Court may make an order that the insolvent's estate be administered in a summary manner.

Upon such order being made—

- (1) *in cases governed by the Presidency-towns Insolvency Act*, the provisions of that Act will apply subject to the following modifications, namely:—(i) no appeal will lie from any order of the Court except by leave of the Court ; (ii) no examination of the insolvent shall be held except on the application of a creditor or the Official Assignee ; (iii) the estate must, where practicable, be distributed in a single dividend ; and (iv) such other modifications as may be prescribed with the view of saving expense and simplifying procedure : provided that nothing herein contained shall permit the modification of the provisions of the Act relating to the discharge of the insolvent. The Court may at any time, if it thinks fit, revoke an order for the summary administration of an insolvent's estate ;
- (2) *in cases governed by the Provincial Insolvency Act*, the provisions of that Act will apply subject to the following modifications, namely:—(i) unless the Court otherwise directs, no notice required under that Act should be published in the local official Gazette ; (ii) on the admission of a petition by a debtor, the property of the debtor must vest in the Court as a receiver ; (iii) at the hearing of the petition, the Court must inquire into the debts and assets of the debtor, and determine the same by order in writing, and it is not necessary to frame a schedule under the provisions of sec. 33 ; (iv) the property of the debtor must be realised with all reasonable despatch and thereafter, when practicable, distributed in a single dividend ; (v) the debtor must apply for his discharge within six months from the date of adjudication ; and (vi) such other modifications as may be prescribed with the view of saving expense and simplifying procedure : provided that the Court may at any time direct that the ordinary procedure provided for in that Act should be followed in regard to the debtor's estate, and thereafter that Act will have effect accordingly.

Under both Acts before an order is made for summary administration the Court must be satisfied *by affidavit or otherwise* that the property of the debtor is not likely to exceed the prescribed amount.

**Paras.
743, 744**

Under the Presidency-towns Insolvency Act, the Court may make an order *on a report of the Official Assignee* that the property is not likely to exceed the prescribed amount. The report is *prima facie* to be acted upon, and the Court ought not, at any rate not without some definite reason, to refuse to make the order (f).

Under the Presidency-towns Insolvency Act if leave to appeal is refused by the Insolvency Court, the parties aggrieved thereby may apply to the Appellate Court for special leave to appeal, and such leave may be granted if a question of principle is involved (g).

Under the Provincial Insolvency Act, the Court itself becomes a Receiver on the admission of a petition by the debtor. It is therefore improper for the Court to appoint any *interim* Receiver under sec. 20 of the Act (h).

744. Insolvency rules as to summary administration.—As to Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 157-158; Madras Rules 99-106; Bombay Rules 160-160A; Rangoon Rule 224. As to Rules under the Provincial Insolvency Act, see Calcutta Rule 30; Madras Rule XXIII; Bombay Rule XXV; Allahabad Rule 34.

(f) *Re Horniblow* (1885) 2 Morr. 124.

(g) *Panachand v. Dobson* (1923) 25 Bom. L. R. 161, 72 I. C. 261, ('23) A.B.

245.

(h) *Ramanatha v. Vijayaraghavalu* (1927) 106 I. C. 34, ('27) A.M. 983.

V. ADMINISTRATION OF ESTATES OF DECEASED INSOLVENT DEBTORS.

745. Deceased insolvent debtors (P.-t. I. A., s. 108).—The Presidency-towns Insolvency Act, following the English Bankruptcy Acts (i), contains provisions for the administration in insolvency of the estates of persons who have died insolvent. There are no such provisions in the Provincial Insolvency Act. Para. 745

As in the case of ordinary insolvencies a petition by a *creditor* of the deceased debtor is the first step. No petition can be presented by the legal representative of the deceased as it may be done under the English Law (j). The creditor must be one whose debt would have been sufficient to support an insolvency petition against the debtor had he been alive. The Court to which the petition may be presented must be one within the limits of whose ordinary original civil jurisdiction the debtor resided or carried on business for the greater part of the six months immediately prior to his death. The petition must be in the prescribed form praying for an order for the administration in insolvency of the estate of the deceased debtor.

Notice of the presentation of the petition must be given to the legal representative of the deceased. On this being done and the petitioning creditor's debt being proved, the Court may make the order, unless it is satisfied that there is a sufficient probability that the estate will be sufficient to pay the debts of the deceased. If cause is shown against making the order, the Court may dismiss the petition with or without costs.

There is one case in which no petition can be presented at all for administration, and that is where a suit or other proceeding to administer the estate has already been commenced in any Court. In such a case the Court in which the proceedings have been instituted has power, on proof that the estate is insolvent, to transfer the proceedings to the Insolvency Court, and the latter Court may thereupon make an order for the administration of the estate, and the same consequences will follow as under an administration order made on a creditor's petition. It is a condition precedent to making the order that the Court shall be judicially satisfied of the insolvency of the estate; mere probability that it is so is not sufficient (k). The power to order a transfer is discretionary, and the Court may refuse to order a transfer even if the estate is shown to be insolvent (l). A transfer, however, will be made in the absence of any *special reasons* for retention, as where there are questions of legal difficulty necessitating a reference to the Judge from time to time or where the proceedings in the case are far advanced, judgment has been pronounced, and inquiries already made (m). The

(i) B.A. 1914, s. 130.
(j) B.A. 1914, s. 130 (9).
(k) *Re Hay* (1915) 2 Ch. 198.

(l) *Re Baker* (1890) 44 Ch. D. 262.
(m) *Re Kemoard* (1906) 94 L. T. 277.

**Paras.
745, 746**

reason is that "the Bankruptcy Act intended that the administration of the estate of a deceased insolvent should be carried out in the same way, as far as possible as the administration of his estate would be if he were alive and bankrupt" (n). Where a suit for administration of an insolvent estate is transferred to the Insolvency Court, the Court may allow the costs of the parties to the suit taxed as between attorney and client to be paid out of the estate as "testamentary expenses" within the meaning of sec. 109 of the Act (o). It may be observed that even in a suit for administration of the estate of a deceased person, where the estate is insolvent, the same rules are observed as to the respective rights of secured and unsecured creditors and as to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as in insolvency; and all persons claiming to be paid out of such estate may come in under the preliminary decree and make their claims against it (p).

746. Vesting of estate and mode of administration (P.-t. I. A., s. 109).—Upon an order for the administration being made the estate of the deceased vests in the Official Assignee, and he must forthwith proceed to realize and distribute it in accordance with the provisions of the Act. The estate must be administered according to the provisions relating to the administration of the property of an insolvent contained in Part III of the Act, so far as they are applicable, except that the claim of the legal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate must be paid in full in priority to all other debts, and except also that the surplus must be paid to the legal representative, or dealt with in such manner as may be prescribed by the Rules.

The order which is made by the Insolvency Court in respect of the estate of a deceased debtor is *not an order of adjudication*, but an order for the administration of his estate in insolvency (q). It is not an insolvency in common form, but administration in insolvency. Such being the case all the provisions of the Act have not been extended to an administration order in insolvency and it is expressly provided by sec. 109 (2) that the provisions of Part III of the Act, which relate to the administration of the property of an insolvent, are to apply, so far as they are applicable. This excludes the application of other Parts of the Act such as sec. 7 which relates to the power of the Court to decide questions of title arising in insolvency (r). It has accordingly been held that the Court has no power to decide the question of priority between two creditors of the estate under sec. 7, that being the only section under which

(n) *Re Kenward* (1906) 94 L. T. 277, 278.

(o) *Re J. Chapman* (1894) 1 Mans. 413.

(p) See C. P. C., 1908, O. 20, r. 13 (2).

(q) *Hasluck v. Clark* (1899) 1 Q.B. 699.

(r) *Re Crouther* (1887) 20 Q.B.D. 38.

the question can be tried (s). The provisions also of sec. 36 of the Act which relate to the discovery of the insolvent's property do not apply to an administration order (t). [The same was the law in England (u) until it was altered by the Bankruptcy Act, 1914 (v).] So also the provisions of sec. 53, which deprive a judgment-creditor of the benefit of the execution where the assets are not realised before the date of the order of adjudication, do not apply to an administration order (w); nor do the provisions of sec. 55 which deal with voluntary transfers nor those of sec. 56 which relate to fraudulent preference (x). The doctrine of relation back does not apply to an administration order nor do the provisions relating to summary administration of small estates (y). But the provisions as to set off (z) and disclaimer of onerous property by the Official Assignee (a) are included in Part III of the Act, and they apply to the administration in insolvency of the estate of a deceased debtor.

**Paras.
746-749**

747. Payment or transfer by legal representative (P.-t. I. A., s. 110).—The legal representative cannot after notice of the presentation of a petition by a creditor make any payment or transfer any property belonging to the estate of the deceased. If he does so, he will have to account for it to the Official Assignee. For the protection, however, of persons who might have dealt with the legal representative before the date of the order for administration, it is provided by sec. 110 that nothing in any of the sections relating to administration orders is to invalidate anything done in good faith by the legal representative before the date of the order for administration. It is also provided that nothing in any of those sections is to invalidate anything done by a District Judge acting under the powers conferred on him by sec. 54 of the Administrator-General's Act, 1913. That section enables a District Judge in certain cases to make certain payments out of the assets of a deceased person.

748. Saving of jurisdiction of Administrator-General (P.-t. I. A., s. 111).—The provisions as to the administration of the estate of a deceased debtor in insolvency do not apply to any case in which probate or letters of administration to the estate of the deceased have been granted to an Administrator-General.

749. Insolvency Rules as to administration of estates of deceased insolvents.—For rules as to administration of estates of deceased insolvents see Calcutta Rules 159-165, Madras Rules 107-113, Bombay Rules 161-167, Rangoon Rules 225-228.

- (s) *D. J. Kolapore v. Port Commissioners, Rangoon* (1926) 4 Rang. 157, 97 I.C. 224, ('26) A.R. 157; *Sornamal v. Official Assignee, Madras* (1914) 27 Mad. L. J. 66, 70, 24 I.C. 239; *In the matter of the estate of P. A. Mohamed Ganny* (1927) 5 Rang. 375, 104 I. C. 89, ('27) A.R. 284.
- (t) (1927) 5 Rang. 375, 104 I. C. 89, ('27) A.R. 284, *supra*.
- (u) *Re Hewitt* (1885) 15 Q.B.D. 159.
- (v) See B.A., 1914, s. 130 (5).
- (w) *Hasluck v. Clark* (1899) 1 Q.B. 699;

- Re Prem Lal Dhar* (1917) 44 Cal. 1016, 43 I. C. 348.
- (x) *Ex parte Official Receiver* (1887) 19 Q.B.D. 92; (1927) 5 Rang. 375, 104 I. C. 89, ('27) A.R. 284, *supra*.
- (y) Under the English law the provisions relating to summary administration of small estates apply to an administration order; see B.A., 1914, s. 130 (5).
- (z) *Watkins v. Lindsay* (1898) 5 Mans. 25.
- (a) *Re Mellison* (1906) 2 K.B. 68.

LECTURE XII.

I.—OFFICIAL ASSIGNEE, RECEIVER AND OFFICIAL RECEIVER.

1. Official Assignee—his appointment, remuneration, etc.

**Paras.
750-753**

750. Appointment and removal of Official Assignee and deputy Official Assignee [P.-t. I. A., s. 77 (1)].—The Chief Justice of each of the High Courts of Judicature at Fort William, Madras, Bombay, and Rangoon and the Judicial Commissioner of Sind may from time to time appoint substantively or temporarily such person as he thinks fit to the office of Official Assignee of insolvents' estates and such person or persons as he thinks fit to the office of deputy Official Assignee for each of the said Courts respectively, and may, with the concurrence of a majority of the other Judges of the Court, remove the person for the time being holding any of the said offices for any cause appearing to the Court sufficient. Every Official Assignee is subject to such rules and is required to act in such manner as may be prescribed. Subject to rules made under sec. 112, the deputy Official Assignee is to have all the powers and is to discharge all the duties and is to be subject to all the liabilities of the Official Assignee.

750A. Security to be given by Official Assignee and deputy Official Assignee [P.-t. I. A., s. 77 (2)].—Every Official Assignee and every deputy Official Assignee is to give such security as may be prescribed by the Rules.

751. Power to administer oath [P.-t. I. A., s. 78].—An Official Assignee may, for the purpose of affidavits, verifying proofs, petitions or other proceedings in insolvency, administer oaths.

752. Duties as regards insolvent's conduct [P.-t. I. A., s. 79].—The duties of an Official Assignee have relation to the conduct of the insolvent as well as to the administration of his estate. In particular it is his duty to investigate the conduct of the insolvent and to report to the Court upon any application for discharge, stating whether there is reason to believe that the insolvent has committed any act which constitutes an offence under the Act or under secs. 421 to 424 of the Indian Penal Code in connection with his insolvency or which would justify the Court in refusing, suspending or qualifying an order for his discharge; to make such other reports concerning the conduct of the insolvent as the Court may direct or as may be prescribed; and to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct or as may be prescribed.

Report as to conduct.—It would seem that the report of the Official Assignee made to the Court under this section is absolutely privileged (a), and no action for libel would lie against him in respect of statements contained in it (b).

753. Duty to furnish list of creditors [P.-t. I. A., s. 80].—The Official Assignee must whenever required by any creditor so to do, and

(a) *Bottomley v. Brougham* (1908) 1 K. B. 584. | (b) *Burr v. Smith* (1909) 2 K. B. 306.

on payment by the creditor of the prescribed fee, furnish and send to the creditor by post a list of the creditors, showing in the list the amount of the debt due to each of the creditors.

Paras.
753, 754

754. Remuneration of Official Assignee (s. 81).—The Official Assignee is to be paid such remuneration as may be prescribed by Rules. No remuneration whatever beyond what is prescribed by Rules can be received by an Official Assignee as such.

Official Assignee's commission.—The remuneration of the Official Assignee or Receiver is in the nature of a commission or percentage on the amount realized by him after payment to secured creditors, or on the amount distributed in dividends, or partly on the one and partly on the other, as may be provided by Rules (c). When property subject to a mortgage is sold free from the mortgage, the Official Assignee or Receiver is not entitled to commission on the full price obtained at the sale, but only on the surplus after payment of the mortgagee's claim, as the surplus alone belongs to the estate (d). Where secured creditors bring suits for sale on their respective securities against the insolvent and the Official Assignee, and questions of priority arising between them it is arranged that the securities should be realized by the Official Assignee, the Official Assignee is not entitled to any commission out of moneys payable to the secured creditors, the sale being really one outside the bankruptcy though made by the Official Assignee (e). The Official Assignee or Receiver must not, under any circumstances whatever, make any arrangement for or accept from the insolvent, or any solicitor, pleader, auctioneer, or any other person that may be employed about any insolvency, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration prescribed by Rules, nor can he make any arrangement for giving up, or give up, any part of his remuneration, to the insolvent or any solicitor, pleader or other person that may be employed about the insolvency (f). It has been held in England that an agreement, whereby in consideration of certain creditors consenting to allow a person to act as a trustee in a certain bankruptcy, the trustee is to allow part of his remuneration, which is to be paid out of the assets, to be applied in securing to those creditors a larger dividend than the other creditors in that bankruptcy, is in fraud of the bankruptcy laws and is illegal. "Equality of treatment is destroyed if in respect of any services rendered by the trustee he has a private bargain with certain creditors that out of his fees they shall be preferred as to the balance unpaid to them out of the estate in general" (g).

Rules as to remuneration of Official Assignee.—For rules fixing the remuneration of the Official Assignee see Calcutta Rule 178, Madras Rules 154, 156, Bombay Rule 180 and Rangoon Rule 202.

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| <p>(c) Under the J. I. A., 1848, s. 19, the remuneration of the Official Assignee was to be paid out of the sum to be distributed as dividends.</p> <p>(d) <i>Re Official Assignee's commission</i> (1906) 36 Cal. 990; <i>R. M. M. Chettyar Firm v. U Hla Bu</i> (1927) 5 Rang. 623, 106 I. C. 200, ('28) A. R. 23; <i>Jorapur v. Venkatesh</i> (1925) 27 Bom. L. R.</p> | <p>1116, 90 I. C. 656, ('25) A. B. 472; <i>K. P. S. P. P. L. Firm v. C. A. P. C. Firm</i> (1929) 7 Rang. 126, 117 I. C. 582, ('29) A. R. 168.</p> <p>(e) <i>Official Assignee of Calcutta v. Ramratan Das</i> (1927) 54 Cal. 317, 102 I. C. 539, ('27) A. C. 529.</p> <p>(f) See <i>B. A.</i> (1914), s. 82 (5).</p> <p>(g) <i>Farmers' Mart Limited v. Milne</i> (1915) A. C. 106.</p> |
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**Paras.
755-758**

755. Misfeasance (s. 82).—The Court will call the Official Assignee to account for any misfeasance, neglect or omission which may appear in his accounts or otherwise, and may require him to make good any loss which the estate of the insolvent may have sustained by reason of his misfeasance, neglect or omission.

Omission to pay dividends.—If the Official Assignee distributes the assets of the insolvent, after deducting his commission, amongst some of the scheduled creditors, though he has notice of the claims of other creditors whose claims are neither admitted nor rejected, he is personally liable for the amount which they would have received but for his negligence (*h*).

756. Name under which to sue or be sued [P.-t. I. A., s. 83].—The Official Assignee may sue and be sued by the name of “the Official Assignee of the property of _____, an insolvent,” inserting the name of the insolvent, and by that name may hold property of every description, make contracts, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

Liability of Official Assignee for costs.—This section does not relieve the Official Assignee from his personal liability to pay any costs which may be ordered to be paid by him, simply by reason of the fact that he sues by his official and not by his individual name (*i*).

757. Office vacated by insolvency [P.-t. I. A., s. 84].—If an order of adjudication is made against an Official Assignee, he thereby vacates the office of Official Assignee.

758. Official Assignee to have regard to directions of creditors [P.-t. I. A., s. 85].—Subject to the directions of the Court, the Official Assignee must, in the administration of the property of the insolvent and in the distribution thereof amongst his creditors, have regard to any resolution that may be passed by the creditors at a meeting. The Official Assignee may summon meetings of the creditors to ascertain their wishes. It is his duty to summon meetings at such times as the creditors by resolution at any meeting, or the Court, may direct, or whenever requested in writing to do so by one-fourth in value of the creditors who have proved. Although the Official Assignee is to have regard to the directions of the creditors, he is not justified in entering into litigation or otherwise acting in a manner which the Court may properly consider to be vexatious and frivolous and wasteful of the property which he has to administer. If he rejects a proof unreasonably and improperly, although in rejecting it he acts under the directions of the creditors, he will be ordered to pay the costs personally. “He is not justified in so acting merely because a stupid committee of

(*h*) *Re Archibald Gilchrist Peace* (1921)
26 C. W. N. 653, 70 I. C. 507,
(21) A. C. 771.

(*i*) *Pooley's Trustee in Bankruptcy v. Whetham* (1885) 28 Ch. D. 38, 41.

inspection, it may be at his own suggestion, have told him to do so, however honest he may be in the sense that he never meant to do anything for his own personal advantage" (j).

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758, 759

Application by Official Assignee for directions.—The Official Assignee may apply to the Court for directions in relation to any particular matter arising under the insolvency (j1). The Court, however, is not obliged to give directions. Where the circumstances are complicated, the Official Assignee ought to deal with the matter himself and ought not to apply to the Court to relieve him from the obligation of forming his own judgment in the matter placed before him by the Act (k). An application for directions is in substitution for a suit; if the Official Assignee applies for directions, and the application is unsuccessful, he is liable to pay costs as in a suit. Where the Official Assignee makes any application the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against costs if there are no assets out of which they can be paid (l). If, however, the application was rendered necessary by the conduct of the insolvent himself, the Official Assignee may be allowed costs out of the estate (m). If the application was rendered necessary by a conflict between various groups of creditors, the costs will fall on the group which was in the wrong and not on the estate or the Official Assignee (n). It is doubtful whether when the Official Assignee applies to the Court for directions in any particular matter, the debtor is in any event entitled to appear and be heard; but if notice is given to the debtor, he is entitled to be heard (o).

759. Discretionary powers of Official Assignee.—Subject to the directions of the creditors, the Official Assignee has to use his own discretion in the management of the estate and its distribution among the creditors. The Court will not interfere with his discretion at the instance of a creditor, unless the Official Assignee is doing "that which is so utterly absurd that no reasonable man would so act" (p). Where the Official Assignee advertise a property for sale subject to certain conditions, and on the day fixed for the sale the conditions were materially changed, the Court set aside the sale on the ground that the action of the Official Assignee was irregular and the irregularity had caused prejudice to the creditors (q). The discretion conferred on the Official Assignee will not justify him in taking the law into his own hands. In *Re Bryant* (r), the landlord of a bankrupt who had absconded from his dwelling house took possession of certain pictures in the house and refused to deliver them to the trustee in bank-

(j) *Ex parte Brown* (1886) 17 Q.B.D. 488

(j1) See Bombay Rule 191.

(k) *Re Pilling* (1906) 2 K. B. 644.

(l) *Ex parte Angerstein* (1874) L. R. 9 Ch. App. 479.

(m) *Re Pilling* (1906) 2 K. B. 644.

(n) *Re F. W. Osborne* (1896) 3 Mans. 238.

(o) *Re Webb & Sons* (1887) 4 Morr. 52.

(p) *Ex parte Lloyd* (1882) 47 L. T. 64.

(q) *Tirurenkatachariar v. Thangayiammal* (1916) 39 Mad. 479, 29 I. C. 294; *Ramabadra Chetty v. Ramswami Chetty* (1923) 44 Mad. L. J. 284, 73 I. C. 374, ('23) A. M. 350.

(r) (1889) 6 Morr. 202.

Paras.
759-763

ruptcy unless the latter proved his title or gave him an indemnity against any risk of an action for conversion. The trustee gave the indemnity, obtained the pictures on the strength of it, and subsequently withdrew it. It was held that the landlord was not entitled to any indemnity, but the Court ordered the trustee to pay his own costs personally. Cave, J., said: "The pictures and the revolver were in the possession of the bankrupt and being in the possession of the bankrupt, it is monstrous that the landlord or any body else should take possession of them and call on the trustee to prove his title.....At the same time I cannot approve of the conduct of the trustee in this matter. He had no right to give the undertaking and obtain the key on the strength of it, and then withdraw the undertaking after obtaining the key. The proper course, if the goods were not given up, was to come to the Court. The trustee must not take the law into his own hands and he had no right to get possession of the property by such a trick as this".

760. Control of Court [P.-t. I. A., s. 87].—If any Official Assignee does not faithfully perform his duties, or if any complaint is made to the Court by any creditor in regard thereto, the Court must enquire into the matter and take such action thereon as may be deemed expedient. The Court may at any time require any Official Assignee to answer any enquiry made by it in relation to any insolvency in which he is engaged, and may examine him or any other person on oath concerning the insolvency. The Court may also direct an investigation to be made of the books and vouchers of the Official Assignee.

761. Accounting to Court [P.-t. I. A., s. 68 (2)].—The Official Assignee must account to the Court and pay over all monies and deal with all securities in such manner as may be prescribed by the Rules or as the Court directs.

762. Insolvency Rules relating to Official Assignees.—For Rules relating to Official Assignees, see Calcutta Rules 168-178; Madras Rules 114-120, 138-151; Bombay Rules 188-194 and Rangoon Rules 200-220.

2. Receiver—His appointment, remuneration, etc.

763. Appointment of Receiver [Prov. I. A., s. 56 (1)].—Under sec. 28 (2) of the Provincial Insolvency Act, the property of the insolvent vests, on the making of an order of adjudication, in the Court or in a Receiver appointed by the Court. A Receiver may be appointed at the time of the order of adjudication or at any time afterwards. If a Receiver is appointed at the time of the order of adjudication, the property vests in him. If no Receiver is appointed at the time of the order of adjudication, the property vests in the Court. Vesting is not suspended until

the actual appointment of a Receiver. A Receiver may be appointed at any time after adjudication, even seven years after adjudication (s). Whatever may be the date of his appointment, all property acquired by and devolving on the insolvent after adjudication vests in him as from the date of acquisition or devolution (t).

The title of the Receiver under the Provincial Insolvency Act relates back to the date of the presentation of the petition on which the order of adjudication is made, and all dealings by the insolvent between that date and the date of the order of adjudication are void as against the Receiver unless they are protected by sec. 55 of the Act (u).

764. Security to be given by Receiver [Prov. I. A., s. 56 (2) (a)].—Subject to such conditions as may be prescribed by the Rules, the Court may require the Receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property.

765. Remuneration of Receiver [Prov. I. A., s. 56 (2) (b)].—Subject to such conditions as may be prescribed by the Rules, the Court may by general or special order fix the amount to be paid as remuneration for the services of the Receiver out of the assets of the insolvent. The principles set forth in paragraph 754 above as to the remuneration of the Official Assignee apply also to the remuneration of the Receiver.

Removal of Receiver.—A Receiver may be removed for just cause (v).

Duties of Receiver.—The primary duties of the Receiver are to take the necessary steps for the discovery of the insolvent's property (w), to realize the property and to distribute it amongst the creditors (x). The Receiver may also make a report on the conduct of the insolvent (y).

766. Negligence or wilful default of Receiver [Prov. I. A., s. 56 (4)].—Where a Receiver fails to submit his accounts at such periods and in such form as the Court directs, or fails to pay the balance due from him thereon as the Court directs, or occasions loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him.

Negligence of Receiver.—It is competent to a third person who is prejudiced by any act of the Receiver to bring it to the notice of the Insolvency Court, and the Court has power to inquire into the conduct of the Receiver,

(s) *Horo Mohun v. Mohan Das* (1924) 39 Cal. L. J. 432, 83 I. C. 360, ('24) A. C. 849.

(t) *Kala Chand Banerjee v. Jagannath Marwari* (1927) 54 I. A. 190, 54 Cal. 595, 101 I. C. 442, ('27) A. PC. 108.

(u) Prov. I. A., s. 28 (7); *Sheonath Singh v. Munshi Ram* (1920) 42

All. 433, 55 I. C. 941; *Tulsi Ram v. Mohamad Arif* (1928) 109 I. C. 373, ('28) A. L. 738.

(v) See *Official Assignee, Tanjore v. Natraja Sastrial* (1923) 46 Mad. 405, 72 I. C. 225, ('23) A. M. 355.

(w) Prov. I. A., s. 59A.

(x) Prov. I. A., ss. 59, 62-67.

(y) See Prov. I. A., s. 38 (4), s. 42 (2).

**Paras.
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and to make such order as it thinks just. Thus where a mortgagee who had obtained a decree for sale purchased the mortgaged property in execution, and the mortgagor afterwards became insolvent, and the Receiver advertised the sale of that and other properties, it was held that it was the duty of the Insolvency Court, on complaint being made by the mortgagee, to inquire into the matter, and if the facts alleged by the mortgagee were found to be correct, to make an order excluding that property from the sale (z).

If goods alleged to belong to the insolvent, but which really belong to another person, are seized by the Receiver at the instance of a creditor, and are subsequently returned to the true owner, it is the creditor, and not the Receiver, who is liable for damages for wrongful seizure and for deterioration of the goods (a).

767. Insolvency Rules relating to Receiver.—For rules relating to Receivers, see Calcutta Rules 12-16; Madras Rules XI-XVI, XVIII; Bombay Rules XII-XX and Allahabad Rules 12-19.

3. Official Receiver—His appointment, remuneration, etc.

768. Appointment of Official Receiver [Prov. I. A., s. 57].—The Local Government may appoint Official Receivers to be Receivers under the Provincial Insolvency Act within such local limits as it may prescribe. In the absence of any exceptional reasons such as personal disqualifications affecting the Official Receiver he alone should be appointed Receiver (b).

769. Sale by Official Receiver.—The power to hear insolvency petitions was one of the powers which could be delegated to the Official Receiver under sec. 52 of the Provincial Insolvency Act, 1907, and under sec. 80 of the Provincial Insolvency Act, 1920, before it was amended. Where such power was delegated to the Official Receiver, the insolvency petition was transferred to him for disposal and he made the order of adjudication, and on his reporting to the Court that the order was made, the Court made an order appointing him Receiver of the insolvent's property and vesting the estate in him. In some cases, however, no such order was made, and the Official Receiver believing that the property of the insolvent vested in him on the making of the order of adjudication by him, sold the property, but the sale was held to be void on the ground that an order of adjudication did not of itself vest the property of the insolvent in the Official Receiver, and that it was necessary for such vesting that a further order should be made appointing him Receiver

(z) *Hanseshur Ghosh v. Rakhal Das Ghosh* (1913) 18 C. W. N. 366, 20 I. C. 683; *Narain Das v. Chimman Lal* (1927) 49 All. 321, 324, 102 I. C. 191, ('27) A. A. 266.
(a) *Abdul Rahim v. Sital Prasad* (1919)

41 All. 658, 54 I. C. 792; *Binda Prasad v. Ram Chandra* (1921) 43 All. 452, 60 I. C. 821, ('21) A. A. 89.
(b) *Official Receiver, Tanjore v. Nataraja Sastry* (1923) 46 Mad. 405, 72 I. C. 225, ('23) A. M. 355.

of the property (c). In some again where a sale was made by the Official Receiver before an order was made appointing him Receiver of the estate, but an order appointing him Receiver was made after the sale, it was held that the title of the purchaser became complete on the making of the order under sec. 43 of the Transfer of Property Act, 1882 (d). There was yet another class of cases in which, having regard to the wording of the order transferring the petition to the Official Receiver, it was held that the effect of the order was to vest the estate in the Official Receiver and that a sale made after such an order was valid. In one of these cases the order was in these terms: "The petition is transferred to the Official Receiver for adjudication and for the administration of the estate" (e). In another case the order was "Referred to the Official Receiver for further proceedings" (f). The power to delegate the hearing of insolvency petitions to the Official Receiver was abrogated by Act XXXIX of 1926, and cases such as the above are not likely to arise.

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770. Powers of Official Receiver.—The Official Receiver has on his appointment as Receiver all the powers of an ordinary Receiver.

771. Remuneration of Official Receiver.—The remuneration of Official Receivers is fixed by the Local Government. He must not receive any remuneration beyond that so fixed. See para. 754 above, "Remuneration of Official Assignee".

772. Delegation of powers to Official Receivers [Prov. I. A., s. 80].—The Insolvency Court has no power to delegate any of its powers to an ordinary Receiver. As to Official Receivers it is provided by sec. 80 of the Provincial Insolvency Act that the High Court, with such sanction as is referred to therein, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by that Act, the Official Receiver shall subject to the directions of the Court, have all or any of the following powers, namely:—(i) to frame schedules and to admit or reject proofs of creditors, (ii) to make interim orders in any case of urgency, and (iii) to hear and determine any unopposed or *ex parte* application. Subject to the appeal to the Court provided for by sec. 68 of the Act, any order made or act done by the Official Receiver in the exercise of the said powers will be deemed to be the order or act of the Court.

(c) *Official Receiver of Trichinopoly v. Sonasundaran Chettiar* (1916) 30 Mad. L. J. 415, 34 I. C. 602; *Muthuswami Swamiar v. Samoo Kandyar* (1920) 43 Mad. 869, 59 I. C. 507; *Vythilinga v. Pannuswami* (1921) 41 Mad. L. J. 78; 62 I. C. 396, ('21) A. M. 642; *Kanaly Shankra Rao v. Ramikrishnayya* (1924) 46 Mad. L. J.

184, 78 I. C. 294 ('24) A. M. 461.
(d) *Basawa Sankaran v. Anjaneyulu* (1927) 50 Mad. 135, 99 I. C. 8, ('27) A. M. 1.
(e) *Subba Aiyar v. Ramaswami Aiyangar* (1921) 44 Mad. 547, 62 I. C. 346, ('21) A. M. 216.
(f) *Sankaranarayana Pillai v. Rajamani* (1924) 47 Mad. 462, 83 I. C. 196, ('24) A. M. 550.

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Powers which may be delegated.—Until about 1926 there were six kinds of powers which could be delegated to the Official Receiver, three of them being those mentioned above, and three others, namely, (1) to hear insolvency petitions, to examine the debtor and to make orders of adjudications; (2) to grant orders of discharge; and (3) to approve compositions or schemes of arrangement. The last three were taken away by sec. 7 of the Provincial Insolvency (Amendment) Act XXXIX of 1926. The only powers which can now be delegated are those mentioned above; namely, (1) to frame schedules and to admit or reject the proofs of creditors; (2) to make *interim orders* in any case of urgency; and (3) to hear and determine any unopposed or *ex parte* application. The Official Receiver has no power to adjudicate upon a claim by a third person to property alleged to belong to the insolvent and claimed by such person as his own. Such a claim can only be tried by the Court under sec. 4 of the Act (g).

4. Court as Receiver.

773. Powers of Court where no Receiver appointed (s. 58).—Where no Receiver is appointed, the Court has all the rights of, and may exercise all the powers conferred on, a Receiver under the Provincial Insolvency Act.

On the making of an order of adjudication under the Provincial Insolvency Act the property of the insolvent vests in the Court or in a Receiver appointed by the Court. The vesting is not suspended until the actual appointment of a Receiver (h). Where no Receiver is appointed the Court may exercise all the powers of a Receiver. Thus it may itself move to set aside a transfer under sec. 53 of the Act at the instance of creditors (i), or it may itself seize goods alleged to belong to the insolvent under sec. 56 (2).

5. Appeals and Review under Presidency-towns Insolvency Act.

This subject may be considered under three heads, namely:—

- A. Review and rehearing.
- B. Appeal from orders of officer empowered under sec. 6 and from orders of Judge exercising insolvency jurisdiction.
- C. Appeal to Court against Official Assignee.

(g) *Vellayappa Chettiar v. Ramana-phan Chettiar* (1924) 47 Mad. 446, 78 I. C. 1017, ('24) A. M. 529.

(h) *Kala Chand Banerjee v. Jagannath Marwari* (1927) 54 I. A. 190,

54 Cal. 595, 101 I. C. 442, ('27) A. PC. 108; *Gobind Das v. Karan Singh* (1918) 40 All. 197, 43 I. C. 672.

(i) *Bansilal Agarwal v. Rangalal* (1923) 71 I. C. 418, ('23) A. N. 97.

A.—Review and rehearing.

774. Review and rehearing [P.-t. I. A., s. 8 (1)].—The Court may review, rescind, or vary any order made by it under its insolvency jurisdiction.

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Sec. 8 (1) gives the Court a discretion of the widest and most far-reaching character, and when properly exercised it is so beneficial in its operation and so calculated to advance the ends of justice that the Court ought not to be restrained by construing it in any niggardly spirit (*j*). In a proper case the jurisdiction to rehear is without limit, and the fact that an appeal from the order is pending does not necessarily prevent a rehearing (*k*). An application to rehear a case, however, cannot be founded upon the same evidence which was presented to the Court on the occasion of the former hearing, and the Court ought not to entertain the application except in the case of clear mistake; but if different materials are discovered which ought to have been then placed before the Court, such application may be made and the Court will, if it sees fit, allow the case to be reheard (*l*). If the order complained of was made *ex parte*, the power of the Court to alter or modify it is circumscribed by no narrow limits (*m*).

In the exercise of the jurisdiction conferred by sec. 8 (1) the Court may review an order dismissing an insolvency petition (*n*), or rescind an order of discharge (*o*), or rescind an order made under sec. 22 of the Act annulling an adjudication on the ground that insolvency proceedings were pending in another Court (*p*), or review an order declaring that a creditor is not a secured creditor (*q*). An application for rehearing may be entertained even if the applicant did not appear to resist the order complained of, if sufficient cause is shown for his non-appearance (*r*).

775. Parallel enactments.—Sec. 8 (1) is based on sec. 104 (1) of the Bankruptcy Act, 1883, now sec. 108 (1) of the Bankruptcy Act, 1914. Sec. 104 (1) of the Bankruptcy Act, 1883, is a reproduction of sec. 71 of the Act of 1869. The power to review, however, was exercised by the Courts in England long before the Act of 1869 (*s*). The Indian Insolvency Act, 1848, did not contain any express enactment as to review and rehearing,

(*j*) *Re Tobias & Co.* (1891) 1 Q. B. 463, 465, per Cave, J.

(*k*) *Ex parte Keighley* (1874) L. R. 9 Ch. App. 667.

(*l*) *Re Ashford* (1887) 4 Morr. 164.

(*m*) *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaha* (1929) 56 Cal. 667, 677-678, 115 I. C. 39, ('28) A. C. 786.

(*n*) *Ex parte Ritso* (1883), 22 Ch. D. 529.

(*o*) *Re Gregory* (1927) 54 Cal. 858, 106 I. C. 326, ('28), A. C. 50.

(*p*) *Official Assignee of Madras v. Official Assignee of Rangoon* (1924) 46 Mad. L. J. 580, 83 I. C. 174, ('24) A. M. 662.

(*q*) *In the matter of L. W. Nasse, Mansuklal Dolatchand & Co.* (1929) 7 Rang. 201, 118 I. C. 615, ('29) A. R. 229.

(*r*) *Re Blennerhasset* (1890) 7 Morr. 282.

(*s*) See *Ex parte Roffey* (1815) 19 Ves. 468, 34 E. R. 590; *Ex parte Atherton* (1868) L. R. 3 Ch. App. 142.

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but it was held that the Insolvency Court had the power to review its own orders (t).

776. Powers of Court to review and rehear.—Sec. 8 (1) gives the Court an unlimited power to review, rescind or vary any order made by it under its insolvency jurisdiction, and sec. 90 (1) which deals with procedure cannot operate to limit that power by importing the provisions of O. 47, r. 1, of the Code of Civil Procedure, 1908, which relates to review (u).

777. Who may apply for a review.—An application for a rehearing under sec. 8 (1) can only be made by a person who was a party to the proceeding in which the order was made. In this respect the right of rehearing is much more limited than the right of appeal in insolvency, for the right of appeal is given not merely to persons who are parties to the original order but to any person aggrieved thereby (v).

In a Bombay case (w), a firm was adjudicated insolvent on the petition of a creditor. Subsequently two of the partners constituting the firm applied for an annulment of the adjudication, and the order was made. Afterwards another creditor of the firm applied to the Court to readjudicate them insolvent. The Court held that the proper course was to apply to rescind the annulment under sec. 8 (1). The application was accordingly amended and the annulment set aside. The Court observed that the proper course was not to proceed by way of appeal, that the applicant was a person aggrieved by the order of annulment, and that according to the English cases the applicant was entitled to a review. It is quite true that the applicant was a "person aggrieved" within sec. 8 (2) (b), but that circumstance gave him a right of appeal from the order of annulment, and not a right of review under sec. 8 (1), he not being a party to the original order. The English cases which the learned Judge had in view were cases not of review or rehearing, but of appeal.

778. Application to what Court.—The power to review, rescind or vary an order can only be exercised by the Court which made it (x). Thus an order made by an officer empowered under sec. 6 of the Act can be reviewed by him alone or his successor. Similarly an order made by a Judge exercising insolvency jurisdiction can only be reviewed by him or another

(t) *In the matter of Thakur Bhagwandas Harjivan* (1880) 4 Bom. 489, 494; *Haji Juckeria v. R. D. Sethna* (1910) 12 Bom. L. R. 27, 5 I.C. 618.

(u) *In the matter of L. W. Nasse, Mansukhlal Dolatchand & Co.* (1929) 7 Rang. 201, 118 I. C. 615, ('29), A. R. 229.

(v) *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaha* (1929) 58 Cal. 667, 679, 115 I. C. 39, ('28) A. C. 786; *Re John Roberts & Co.*

(1904) 2 K. B. 290.

(w) *Re Joharmal Pannaji* (1919) 21 Bom. L. R. 190, 50 I. C. 437.

(x) *Re Maugham* (1888) 21 Q.B.D. 21; *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaha* (1929) 58 Cal. 667, 679, 115 I. C. 39, ('28) A. C. 786, overruling *Re Albert Felix Seldana* (1921) 48 Cal. 1089, 66 I. C. 715, ('21) A. C. 58; *Re Meghraj Purohit* (1923) 27 C. W. N. 916, 80 I. C. 840, ('23) A. C. 83.

Judge exercising that jurisdiction in his place. But a Judge exercising insolvency jurisdiction cannot review an order made by an officer empowered under sec. 6. If the officer makes the order, he is the Court that makes it and he alone is the Court which can review, rescind or vary it (see para. 779 below). Similarly when an order of the Judge has been wrongly drawn up by the Registrar, the proper person to correct the mistake is the Judge and not the Registrar (y). A Divisional Bench sitting in appeal in an insolvency matter may also review, rescind or vary its own order (z).

779. Orders made by officer empowered under sec. 6.—Sec. 6 of the Act provides for the delegation of certain powers under the Act to an officer of the Court, and enacts that an order made by an officer delegated with such powers is to be deemed “the order of the Court.” It follows that the officer to whom the powers are delegated is “the Court” within sec. 8 (1) as regards orders made by him in the exercise of those powers. These orders may be challenged in two ways, namely :—

- (1) by an application for a rehearing under sub-sec. (1) of sec. 8, which must be made to the officer who made the order, he being “the Court” within that sub-section (see para. 778 above) ; or
- (2) by an appeal to the Judge exercising insolvency jurisdiction under sec. 8 (2) (a).

If an application for rehearing, instead of being made to the officer himself, is made to the Judge exercising insolvency jurisdiction, the Judge should treat it as an appeal and hear it on its merits. If the appeal is barred by limitation at that date, the Judge may extend the time under sec. 90 (5) if he is satisfied that the applicant acted with due diligence in presenting his first application to the Judge (a).

780. Limitation for application for review.—As under the Bankruptcy Act, so under the Presidency-towns Insolvency Act, no limit of time is fixed for an application for rehearing. It has been held under the Bankruptcy Act that an application for a review should be made within the time limited for appeal, though it may be entertained on special grounds after the expiration of that time. No review, however, is allowed after the time for appealing has expired if the real object is to get the benefit of an appeal by means of a rehearing (b). In a Madras case (c) the question

(y) *Re Beurd* (1893) 10 Morr. 178.
 (z) *Re Maugham* (1888) 21 Q.B.D. 21, 23; *Official Assignee of Madras v. Official Assignee of Rangoon* (1924) 46 Mad. L. J. 580, 83 I. C. 174, ('24) A. M. 666; *Re Perkins* (1890) 7 Morr. 78.
 (a) *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaha* (1929) 56 Cal. 667, 681, 115 I. C. 39, ('28) A. C. 786.

(b) *Ex parte Nassy* (1884) 12 Q.B.D. 497; *Ex parte Rilsø* (1883) 22 Ch. D. 529; *Re Tobias & Co.* (1891) 1 Q. B. 463, 465; *Ex parte Brown* (1874) L. R. 9 Ch. App. 304, 307.
 (c) *Official Assignee of Madras v. Official Assignee of Rangoon* (1924) 46 Mad. L. J. 580, 83 I. C. 174, ('24) A. M. 666.

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arose whether the Indian Limitation Act, 1908, applied to an application under sec. 8 (1) of the Presidency-towns Insolvency Act. The Court did not express any opinion on the point, but held that even if art. 162, which provides a period of twenty days from the date of the order, applied to the case, the Court had the power under sec. 5 of that Act to extend the time if sufficient cause was shown, and that sufficient cause had been shown in that case to extend the time. The same question arose in a Rangoon case where it was held that art. 181 of the Limitation Act applied and the period of limitation was three years from the date when the right to apply accrued (*d*). It is submitted that this decision is erroneous, and that there is no time limit for an application under sec. 8 (1) of the Presidency-towns Insolvency Act. The section provides not only for a review, but also for a rescission or variation of an order. It is submitted that the principles of English law apply to cases under the Presidency-towns Insolvency Act (*e*).

781. Appeal from order on review.—An appeal lies from an order made on the rehearing of a matter under sec. 8 (1), although the order originally made has not been varied on such hearing (*f*).

B.—Appeal from orders of officer empowered under sec. 6 and from orders of Judge exercising insolvency jurisdiction.

782. Appeal from orders of officer empowered under sec. 6 [P.-t. I. A., s. 8 (2) (a).]—An appeal from an order made by an officer of the Court empowered under sec. 6 lies to the Judge exercising insolvency jurisdiction and no further appeal lies except by leave of such Judge.

An appeal from an order made by an officer delegated with powers under sec. 6 is really an appeal from one Court to another: see para. 779 above, "Orders made by officer empowered under sec. 6."

It will be observed that there is only one appeal from the order made by such officer, unless leave to file a further appeal is granted by the Judge hearing the appeal. There is no appeal from an order refusing leave to appeal.

The rest of sub-sec. 8 (2) (a) is considered with sec. 8 (2) (b).

(*d*) *In the matter of L.W. Nasse, Man-
rakhil Dolutchand & Co.* (1929)
7 Rang. 201, 118 I. C. 615, ('29)
A. R. 229.

(*e*) See in this connection the passage
cited by Rankin, C.J., from
the judgment of Cave, C.J., in
*Sarat Kumar Ray v. Nabin
Chandra Ram Chandra Shaha*

(1929) 56 Cal. 667, at p. 678, 115
I. C. 39, ('28) A. C. 786. The
passage is cited with approval,
though as to the latter part there
of the learned Judge was inclined
to go further than Cave, J.
(*f*) *Re Bishop* (1891) 8 Morr. 221; *Re
Ashworth and Outram* (1893) 10
Morr. 175.

783. Appeal from orders of Judge exercising insolvency jurisdiction [P.-t. I. A., s. 8 (2) (b)].—Save as otherwise provided in sec. 8 (2) (a), an appeal from an order made by a Judge exercising insolvency jurisdiction lies in the same way and subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.

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Sec. 8 (2) corresponds to sec. 108 (2) of the Bankruptcy Act, 1914. Appeals under the Indian Insolvency Act, 1848, were governed by sec. 73 of the Act.

784. Appeal to what Court.—An appeal from an order in an insolvency matter made by an officer empowered under sec. 6 lies to the Judge exercising insolvency jurisdiction and no further appeal lies except by leave of such Judge. An appeal from an order in an insolvency matter made by a Judge sitting in insolvency lies in the same way and subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.

785. Orders appealable.—For the purposes of appeal orders in insolvency matters fall into two classes, namely, (1) orders made by an officer with delegated powers under sec. 6, which orders are to be deemed orders of the Court; and (2) orders made by a Judge exercising insolvency jurisdiction. As to orders made by an officer empowered under sec. 6, *every* order made by him in an insolvency matter is appealable. As to orders made by a Judge exercising insolvency jurisdiction, *every* order made by him in an insolvency matter is appealable “in the same way” and “subject to the same provisions” as an appeal from an order made by a Judge “in the exercise of the ordinary original civil jurisdiction of the Court.” The words “in the same way” refer *inter alia* to the filing of the memorandum of appeal in the Prothonotary’s office and so forth, as provided by the Original Side Rules. The words “subject to the same provisions” mean subject to the law of limitation and other statutes enacting adjective law. There is no limitation put upon appeals from orders made by a Judge exercising insolvency jurisdiction except perhaps orders regulating procedure. An appeal, therefore, lies from an order made by a Judge sitting in insolvency granting protection to an insolvent under sec. 25 of the Act (g). Similarly an appeal lies from an order refusing to transfer an insolvency petition under sec. 97 of the Act (h). It has been held by the High Court of Rangoon that no order made by a Judge sitting in insolvency is appealable unless it comes either under O. 43, r. 1, of the Code of Civil Procedure, 1908, or is a “judgment” within the meaning of clause 13 of the Letters Patent of that Court. It has accord-

(g) *Mahomed Haji Essac v. Shaik Abdool Rahiman* (1916) 40 Bom. 461, 31 I. C. 507.

(h) *V. A. V. S. Firm v. Muruganathan Chetty* (1925) 48 Mad. 514, 86 I. C. 1031, (25) A. M. 569.

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ingly been held that no appeal lies from an order refusing to issue a commission on the application of an insolvent for the purposes of a petition to annul his adjudication (i), or from an order made by a Judge in the exercise of his discretion under sec. 7 of the Act referring a person who claims that certain property in the hands of the Official Assignee was held by the insolvent as a trustee to a regular suit (j). In the view of the Rangoon High Court the words "subject to the same provisions" in sec. 8 (2) (b) import the provisions of O. 43, r. 1, of the Code and of clause 13 of the Letters Patent. This view, it is submitted, is erroneous.

786. Who may appeal.—It is a peculiarity of the law of bankruptcy that not only a party to an order, but also one who was not a party to it, is entitled to appeal from the order if he is a "person aggrieved" by the order. The reason is that proceedings in bankruptcy affect not only those who are parties thereto, but also other people (k).

787. Person aggrieved.—The expression "person aggrieved" has been taken from the corresponding section of the English Bankruptcy Acts (l). The meaning of that expression was explained in *Ex parte Sidebotham* (m) by James, L.J., a great authority on the law of bankruptcy, in these terms: "It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." Two expressions in this classical judgment were further explained by Lord Esher M.R. in *Ex parte Official Receiver* (n). As to the expression "legal grievance" the Master of the Rolls said that the grievance suffered must be a legal grievance: a pecuniary grievance, or a grievance to property or person, may not of itself be a legal grievance. As to the expression "wrongfully refused him something" he said: "It cannot mean wrongfully refusing him something unless it be a refusal of something for which he had a right to ask, so that that definition of James, L.J.,

(i) *Abdul Gaffor v. The Official Assignee* (1925) 3 Rang. 605, 93 I. C. 211, ('26) A. R. 64.

(j) *Arjuna Iyer v. Official Assignee, Rangoon* (1928), 6 Rang. 363, 111 I. C. 836, ('28) A. R. 246.

(k) *Re Michael* (1891) 8 Morr. 305, 306; *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shukla* (1929) 56 Cal. 667, 679, 115 I. C. 39, ('28) A. C. 786; *Rustomjee Dorabjee v.*

K. D. Brothers (1926) 53 Cal. 866, 877, 99 I. C. 736, ('27) A. C. 163; *Chowdappa Gownder v. Kathaperumal Pillai* (1926) 56 Mad. L. J. 602, 609, 92 I. C. 20, ('26) A. M. 18.

(l) B. A., 1883, s. 104; B. A., 1914, s. 108.

(m) (1880) 14 Ch. D. 458, 465.

(n) (1887) 19 Q. B. D. 174, 177.

would mean a 'person aggrieved' must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a *right* to demand." The definition of James, L. J., has been followed in almost every case both English and Indian in which the question arose whether a person was a "person aggrieved" so as to entitle him to appeal.

• *Ex parte Sidebotham* (o), referred to above, was a case under the Bankruptcy Act, 1869. In that case the Comptroller in Bankruptcy made a report that the trustee in bankruptcy had been guilty of misfeasance, by which the estate had suffered a loss of £1,253, that he had called upon the trustee to make good the loss, but that he had failed to do so, and applied to the Court to enforce the requisition against the trustee. The Court refused to make any order. The Comptroller did not appeal from this refusal, but the bankrupt, Sidebotham, who had not obtained his discharge, appealed. It was contended on behalf of the bankrupt that if the order asked for by the Comptroller had been made and the trustee had been directed to pay £1,253, the estate would have paid a dividend of more than 10s. in the pound, and then, under sec. 48 of the Act, the bankrupt would have been entitled to his discharge. But this argument was not accepted and it was held that the bankrupt was not a "person aggrieved" and had no *locus standi* to appeal. "In the present case," said James, L.J., "no one is prejudiced by the refusal of the Court to act on the Comptroller's report, except in so far as he has lost any benefit which he might have obtained if an order had been made; there is nothing to embarrass him in any proceedings which he may wish to take against the trustee. If there has been any misfeasance on the part of the trustee, the bankrupt or any creditor has a right under sec. 20 to apply to the Court, not because the Comptroller has made a report to the Court, but because he is entitled to make his own case against the trustee" (p).

Any person who asks for a decision from a Court which he had a *right* to ask, or any person who is brought before a Court to submit to a decision, is, if the decision goes against him, a "person aggrieved" by the decision (q).

788. Appeal against order of adjudication.—Under the Bankruptcy Act, 1869, sec. 10, the production of a copy of the "London Gazette" containing any notice of an order adjudging a debtor bankrupt is conclusive evidence in all legal proceedings of the order having been "duly made." Further, under sec. 11 of that Act the bankruptcy of a debtor is deemed to relate back to and to commence at—

- (1) the time of the act of bankruptcy being completed on which the order of adjudication is made; or

(o) (1880) 14 Ch. D. 458.

(p) *Ex parte Sidebotham* (1880) 14 Ch. D. 458, 466.

(q) *Re Lamb* (1894) 2 Q. B. 805, 812;
Ex parte Official Receiver (1887)

19 Q. B. D. 174, 178; *Ketokey Churan Banerjee v. Sreemutty Sarat Kumar Dasee* (1915) 20 C. W. N. 995, 37 I. C. 71.

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- (2) if the bankrupt is proved to have committed more acts of bankruptcy than one, the time of the first of the acts of bankruptcy that may be proved to have been committed by him within twelve months next preceding the order of adjudication.

It has been held in *Ex parte Learoyd* (r) that the combined effect of secs. 10 and 11 of the Act of 1869 is that an adjudication is, so long as it stands, conclusive evidence *as against a third person* that the act of bankruptcy on which the adjudication was professedly founded was in fact committed, and that the title of the trustee relates back to that act of bankruptcy. A third person, therefore, whose title is affected by the adjudication is a "person aggrieved" and he is entitled as such to appeal from the order and to have it set aside; if he does not, he cannot dispute it afterwards. In that case James, L.J., said: "A man cannot be 'duly' adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be 'duly' adjudged a bankrupt. That he has been 'duly' adjudged a bankrupt, necessarily involves the previous commission of an act of bankruptcy. The mere fact that an adjudication has been made could have been proved without the aid of sec. 10. That section may, however, only involve this, that some act of bankruptcy had been committed before the adjudication was made. But then comes sec. 11 which has no operation at all as between the bankrupt and the trustee. The bankrupt has no rights whatever; all his rights have been transferred to the trustee. The mere fact that sec. 11 is dealing with the relation back of the trustee's title, shows that it is dealing with the rights of third persons and not merely with the rights of the bankrupt and persons indebted to him. The adjudication in the present case is based on a particular act of bankruptcy which is alleged in the petition. [His Lordship referred to the form of the adjudication]. The act of bankruptcy alleged was that the bankrupt absented himself from his dwelling-house on a particular day, with intent to defeat or delay his creditors, and by the adjudication it was conclusively settled that he had committed that act of bankruptcy. Then sec. 11 goes on to provide that by way of enlargement of the trustee's title he may go behind the act of bankruptcy on which the adjudication was founded and may, under certain circumstances and subject to certain limitations, prove that other earlier acts of bankruptcy have been committed and if this is done the trustee's title is to relate back to the earliest act of bankruptcy which is proved to have been committed within twelve months before the adjudication. This, however, is to be *proved by evidence*, whereas the act of bankruptcy on which the adjudication is founded is *proved by the production of the adjudication itself*. It seems to me impossible to evade the words of these sections."

(r) (1878) 10 Ch. D. 3; *Ex parte Ellis*
(1876) 2 Ch. D. 797; *Ex parte*
Tucker (1879) 12 Ch. D. 308;

Haji Jackeria v. R. D. Sethna
(1910) 12 Bom. L. R. 27, 5 I. C.
618.

The facts of *Ex parte Learoyd* are stated in illustration (b) below.

Sec. 10 of the Bankruptcy Act, 1869, was repealed and re-enacted in a modified form as sec. 132 in the Bankruptcy Act, 1883, now sec. 137 of the Bankruptcy Act, 1914. Sec. 11 of the Act of 1869 was repealed and re-enacted with some alterations in sec. 43 in the Bankruptcy Act, 1883, now sec. 37 (1) of the Bankruptcy Act, 1914. The alterations do not affect the decision in *Ex parte Learoyd*, and the decision has been applied to cases under the Bankruptcy Acts of 1883 and 1914 (s). The rule in *Ex parte Learoyd* may be explained by illustrations.

Illustrations.

(a) *A* presents a bankruptcy petition against *D*, the act of bankruptcy alleged against *D* being the execution of a mortgage by him of all his property in favour of *M*. An adjudication order is made founded upon the execution of the mortgage as an act of bankruptcy, and the order is notified in the London Gazette. [Here *M* is a "person aggrieved" by the adjudication order for his title is affected by the order, and he is entitled to appeal from the order (t)]. *M* does not appeal from the order. Afterwards the trustee in bankruptcy applies for a declaration that the mortgage is void as against him, and produces a copy of the London Gazette notifying the adjudication. At the hearing of the trustee's application *M* seeks to prove that the execution of the mortgage was not an act of bankruptcy. *M*, not having appealed against the adjudication, the adjudication is conclusive as against him as to the act of bankruptcy having in fact been committed, and he is precluded from disputing that the act of bankruptcy was committed. The trustee, therefore, is entitled to the declaration that the mortgage is invalid.

The above result is arrived at by reading together secs. 10 and 11 of the Bankruptcy Act, 1869. By virtue of sec. 10 of that Act [Presidency-towns Insolvency Act, sec. 116] the production of a copy of the London Gazette notifying the adjudication order is conclusive evidence of the order having been "duly" made. An adjudication could not be said to have been "duly" made unless the Court was satisfied that the act of bankruptcy specified in the bankruptcy petition was in fact committed. It must, therefore, be taken when an adjudication order is produced, that the act of bankruptcy on which the order is made was in fact committed. It follows from this that the adjudication order is conclusive evidence as to that act having in fact been committed. It is conclusive evidence not only as against the bankrupt, but also against the world, that is, against persons who were not parties to it. This is by virtue of the provisions of the first part of sec. 11 of the Bankruptcy Act, 1869 [Presidency-towns Insolvency Act, sec. 51 (a)], for under that section the title of the trustee relates back to the time of the commission of the act of bankruptcy on which the adjudication order is made. Applying this to the facts of the present illustration the title of the trustee relates back to the execution of the mortgage in favour of *M*. The effect of the relation back of the trustee's title would be that at the time when the mortgage was executed the trustee was the owner in law of the mortgaged property, and not *D*. The trustee, and not *D*, being the owner, *D* could no lawfully execute a mortgage of the property in favour of *M*. It is thus that a *third* person, that is, a person who was not a party to the adjudication order, is brought in. The adjudication order affects his rights, and he is, therefore, entitled to appeal from the order. If he does not appeal, he will be precluded from contending that the act of bankruptcy was in fact committed, and the transfer made by the debtor in his favour will be set aside. This may appear at first sight to be a hard rule, for a third person affected by the order may not become aware of the adjudication until after the time for appealing has expired. But the law has provided for such a case, and it has been held that if a third person who is aggrieved by an adjudication order does not become aware of it until after the expiration of the time limited for appealing, he is entitled *ex debito justitiae* to an extension of the time for appealing if he applies promptly after he becomes aware of it (u). In India the Court has the power to extend the time under sec. 5 of the Indian Limitation Act, 1908.

(b) On August 5, 1929, *D* executes a mortgage of his property in favour of *M*. On September 10, 1929, *D* departs from his dwelling-house. On November 2, 1929, a

(s) *Hawkins v. Douche* (1921) 37 T. L. R. 748, 750.

(t) *Ex parte Ellis* (1876) 2 Ch. D. 797.

(u) *Re Tucker* (1879) 12 Ch. D. 308. See also Bankruptcy Rules, Rule 130.

Para. 768 petition is presented against him, the act of bankruptcy alleged against him being that he departed from his dwelling-house with intent to defeat his creditors. An adjudication order is made against *D* on the same day founded on the departure as an act of bankruptcy, and it is notified in the London Gazette. *M* does not appeal against the adjudication, and he realises his security. The trustee in bankruptcy claims the proceeds of the sale alleging that the execution of the mortgage was an act of bankruptcy and that his title relates back to the time of the execution. At the hearing of the trustee's application *M* seeks to prove that *D*'s departure from his dwelling-house was not with intent to defeat or delay his creditors and that the departure did not constitute an act of bankruptcy. The trustee produces a copy of the London Gazette containing notice of the adjudication order. The adjudication is conclusive evidence against *M* as to the act of bankruptcy having in fact been committed and he is precluded from disputing that the departure was with intent to defeat the creditors. But it is not any evidence against *M* that the execution of the mortgage was also an act of bankruptcy, the adjudication order not having been founded on it. The trustee must *prove* that the execution of the mortgage was an act of bankruptcy, and this he has to do because of the provisions of the second part of sec. 11 of the Bankruptcy Act, 1869 [Presidency-towns Insolvency Act, sec. 51 (2)]. If the trustee succeeds in proving that the execution of the mortgage was an act of bankruptcy, his title will relate back to the time of the execution of the mortgage. The effect of the relation back of the trustee's title would be that at the time when the mortgage was executed the trustee was the owner in law of the mortgaged property, and not *D*. The trustee, and not *D*, being the owner, *D* could not lawfully execute a mortgage of the property in favour of *M*. The mortgage is, therefore, void as against the trustee, and the proceeds of the sale belong to the trustee: *Ex parte Learoyd* (1878) 10 Ch. D. 1 (with dates altered).

It may be observed that *M* is not bound to appeal from the adjudication order, though he is entitled to do so. He may appeal from the order, or he may not. If he appeals and succeeds in setting aside the adjudication, the advantage he gains is that the mortgage to him cannot afterwards be impeached in bankruptcy, as the title by relation back is limited to three months before the presentation of a bankruptcy petition, and the three months would expire on November 5, 1929. If he does not appeal, the only consequence is that he will be precluded from disputing that the departure constituted an act of bankruptcy, but his right to protect the mortgage against the trustee will remain unaffected.

(c) A debtor is adjudged bankrupt by a County Court on two acts of bankruptcy, one of them being the execution of a mortgage in favour of *M*, and the other being departure from his place of business with intent to defeat his creditors. *M* appeals against the adjudication to the Divisional Court. The Divisional Court may, instead of taking evidence and deciding whether the execution of the mortgage was an act of bankruptcy, amend the adjudication order by striking out all reference to the execution of the mortgage as an act of bankruptcy, and leaving it to the trustee to raise the question of the validity of the mortgage before the County Court: *Re A Debtor* (1912) 106 L. T. 344; *Re Tucker* (1879) 12 Ch. D. 308. This would seem to be a convenient practice to be followed also in India.

We now turn to the Presidency-towns Insolvency Act. The sections of that Act corresponding to the sections of the English Acts referred to above (v) are sec. 116 and sec. 51. Sec. 116 is as follows:—

"(1) A copy of the official Gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice.

(2) A copy of the official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date."

Sec. 51 is as follows:—

"The insolvency of a debtor, . . . shall be deemed to have relation back to and to commence at—

(a) the time of the commission of the act of insolvency on which the order of adjudication is made against him, or

(v) Gazette to be evidence—B.A., 1869, s. 10; B.A., 1883, s. 132; B.A., 1914, s. 137. Relation bank of

trustee's title—B.A., 1869, s. 11; B.A., 1883, s. 43; B.A., 1914, s. 37 (1).

- (b) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first act of insolvency *proved* to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition.

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The sections of the Presidency-towns Insolvency Act being based upon the corresponding sections of the English Acts it would follow that a case similar to *Ex parte Lloyd (w)* arising under the Presidency-towns Insolvency Act would be decided in the same way as *Ex parte Lloyd* was under the English Act. The High Court of Madras, however, has held otherwise. In the Madras case (*x*), a debtor was adjudged insolvent, the act of insolvency proved against him being that he made a payment of Rs. 10,000 by way of fraudulent preference to a particular creditor. Afterwards the Official Assignee applied for an order against the creditor for payment of the money to him. It was argued for the Official Assignee on the authority of *Ex parte Learoyd* and other cases that the creditor not having appealed from the order of adjudication the adjudication was conclusive evidence as against him that the act of insolvency constituted by the fraudulent preference was committed and that it was not open to the creditor to show that the payment was not made by way of fraudulent preference. This argument was not accepted and it was held that the adjudication having been made behind the back of the creditor the Official Assignee was not entitled to the order unless he *proved* that the payment was by way of fraudulent preference. As to the English cases it was said that they were not an authority for the proposition that an adjudication was conclusive evidence *as against a third person* that the act of insolvency on which the adjudication was founded was in fact committed. This, indeed, is a very bold statement, for all text writers on the subject have understood those cases to lay down that very proposition (*y*). The judgment of the Madras High Court proceeded on three grounds.

The first ground was that if an adjudication was conclusive evidence *as against a third person*, it would involve great hardship to persons who had not the opportunity of being heard at the time when the adjudication was made. As to this it may be said that three separate judgments were delivered in *Ex parte Learoyd* and the question of hardship was considered in each judgment. The learned Judges said that a person whose title was affected by the adjudication, being a "person aggrieved" by the adjudication, had a remedy by way of appeal, and that if this remedy was not sufficient it was a matter to be dealt with by the Legislature. The Legislature, it may be observed, has not made any change in the law since the decision in *Ex parte Learoyd*. See illustration (a) above.

The second ground was that if the adjudication were conclusive evidence *as against a third person*, "the sections which deal with the avoidance of voluntary transfers and fraudulent preferences and similar matters would have excluded from the necessity of such avoidance, by excepting such transfers, preferences, etc., which have already been made the ground of adjudication." But this overlooks the provisions of sec. 51 of the Act—a section which does not seem to have been brought to the notice of the Court.

(w) (1878) 10 Ch. D. 1.

(x) *Official Assignee of Madras v. O. R. M. O. R. S. Firm* (1927) 50 Mad. 541, 101, 1. C. 12, ('27) A. M. 526.

(y) See Williams on Bankruptcy, 13th ed., pp. 211, 432; Wace on Bankruptcy, pp. 316, 334; Baldwin on Bankruptcy, 11th ed., p. 220.

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The third ground may be considered piecemeal. It was said that the notification in the Gazette did not state the act of insolvency. But this is not required either by the Indian or the English law (2). The notification of the adjudication order in *Ex parte Learoyd* also did not set forth the act of bankruptcy, and a point was made of it in the argument of counsel, but no notice was taken of it in any of the judgments. It was also said that even if the act of insolvency were stated in the notification, the notification would only have been evidence that the act of insolvency mentioned in it was committed, and not conclusive evidence thereof. This does not give full effect to the words "duly made" in sec. 116. The adjudication having been "duly made" it must be taken to have been founded upon proof of a proper act of insolvency. The notification, therefore, must be treated as *conclusive evidence* that the act of insolvency was committed, and not mere evidence of that fact [see ill. (a) above]. Lastly it was said that even if the notification were conclusive evidence of the commission of the act of insolvency, it was not conclusive evidence *as against a third person*. It is quite true that sec. 116, standing alone, cannot render an adjudication conclusive evidence *as against a third person* that the act of insolvency on which the adjudication was founded was in fact committed. That section must be read with sec. 51, and it is only by reading the two sections together that the above result is arrived [see ill. (a) above]. The Madras High Court seems to have overlooked sec. 51 altogether. The Madras decision, it is submitted, is not correct, though it would seem highly desirable at least in this country to amend the Act in conformity with that decision. The only argument against the amendment is that an order of adjudication should be set aside, if it is to be set aside at all, without unnecessary delay, for it might otherwise cause considerable inconvenience.

Trustee, executor and receiver.—A trustee of an assignment for the benefit of creditors is a "person aggrieved" by an order of adjudication, and may appeal from it where the order is founded on the execution of the deed as an act of insolvency (a). But the executor of a deceased partner is not a "person aggrieved" by a receiving order made against the surviving partner in the firm name; the order being against the surviving partner alone the executor has no *locus standi* to appeal (b). Nor has a receiver in a partnership suit any *locus standi* to appeal from an adjudication order made against the firm (c).

789. Petitioning creditor.—A petitioning creditor may appeal from the dismissal of his petition, even though after the dismissal an order of adjudication has been made on the debtor's petition. In such a case the proper order to make, if the appeal succeeds, is to direct that the order of adjudication made against the debtor should be amended so as to be dated on the day when the Court ought to have made an order of adjudication on the creditor's petition (d).

790. The insolvent.—On the making of an order of adjudication the whole of the estate of the insolvent vests in the Official Assignee, and

- (2) The order of adjudication refers to the petition on which it is made, and the act or acts of bankruptcy are set forth in the petition.

- (a) *Re Batten* (1889) 22 Q. B. D. 685;
Ex parte Sadler (1878) 48 L. J.

Ba. 43 (1878) 39 L. T. 361.

- (b) *Re Jameson and Sandys* (1891) 8 Morr. 278.

(c) *Re Jameson and Sandys*, supra.

- (d) *Re Haynes* (1880) 7 Morr. 50; *Re Johns* (1893) 10 Morr. 190.

the insolvent has no interest in it. "A bankrupt can do nothing to embarrass the administration of his estate." Even as regards the surplus he has no property in it; he has nothing more than a mere hope or expectation (e). He cannot therefore be a "person aggrieved" by any act of the Official Assignee in the course of the administration of his estate. If any part of his property is sold by the Official Assignee, he cannot appeal under sec. 86 of the Presidency-towns Insolvency Act on the ground that the sale was prejudicial to him, for he has no interest in the property (f). The insolvent, however, is a "person aggrieved" by an order committing him for contempt of Court for wilful failure to deliver up to the Official Assignee property forming part of his estate and is as such entitled to appeal from the order (h). Where on an application by the Official Assignee for directions notice is served upon the insolvent, but at the hearing the Court refuses to hear him, he is a "person aggrieved" and entitled to appeal from the refusal (i).

791. Official Assignee.—As a general rule the Official Assignee is a "person aggrieved" by any order which affects the estate adversely, and he is entitled to appeal from it. If he refuses to appeal or allow his name to be used, any creditor may apply to the Court for leave to appeal in his own name as representing the general body of creditors (j) or for leave to use the name of the Official Assignee on giving him an indemnity against costs (k). See para. 792, sub-para. II.

Where a claim made by a creditor to be paid in full is rejected by the Official Assignee, but is allowed by the Court, the Official Assignee is a "person aggrieved" by the order and is entitled to appeal from it (l).

792. Creditors.—Cases in which the question has arisen whether a creditor is a "person aggrieved" and as such entitled to appeal fall into three classes, namely:—

I. Where the order complained of affects only an individual creditor and his interest.

II. Where the order adversely affects the insolvent's estate.

III. Other orders.

I. Where the order complained of affects an individual creditor alone, he alone is the "person aggrieved" and he alone is entitled to appeal. Thus if a creditor's proof is not admitted in full, or if a creditor claims to be a secured creditor but his claim is disallowed, he alone is the "person aggrieved" and he alone is entitled to appeal.

II. Where the order complained of adversely affects the insolvent's estate, as where a claim made by a third person against the estate is

(e) *Re Leadbitter* (1878) 10 Ch. D. 388;
Ex parte Sheffield (1879) 10 Ch. D. 434.

(f) *Hari Rao v. Official Assignee, Madras* (1926) 49 Mad. 461, 94 I. C. 642, ('26) A. M. 556; *Sakhawat Ali v. Radha Mohan* (1919) 41 All. 243, at p. 244, 49 I. C. 816 [a case under Prov. I. A., 1907].

(h) *Re Ashwin* (1890) 25 Q. B. D. 271.
See P.-t. I. A., s. 33 (4).

(i) *Re Webb and Sons* (1887) 4 Morr. 52.

(j) See *Tyeb Ali v. Purna* (1926) 43 Cal. L. J. 219, 230, 93 I. C. 898, ('26) A.C. 618; *Re Surajmull Munghchand* (1921) 26 C. W. N. 803, 70 I. C. 463, ('21) A.C. 403.

(k) See *Ex parte Kearsley* (1886) 17 Q. B. D. 1.

(l) *Official Assignee of Madras v. Ramchandra Iyer* (1910) 33 Mad. 134, 5 I. C. 974 [a case under I. I. A., 1848].

Para. 792 allowed, or a claim made by the Official Assignee against a third person, e.g., under sec. 55 or sec. 56 of the Act is disallowed, the proper person to appeal from the order is the Official Assignee, and not a creditor or creditors. This is not because a creditor is not a "person aggrieved," for he is certainly aggrieved by the order, but because the Official Assignee represents the general body of creditors and all proceedings relating to the estate of the insolvent must be taken by him or in his name. If he refuses to appeal or to allow his name to be used, any creditor may apply to the Court for leave to appeal in his own name as representing the general body of creditors (m) or for leave to use the name of the Official Assignee on giving him an indemnity against costs (n).

III. The third class of cases comprises orders such as an order of discharge or a protection order.

An unpaid creditor may appeal from an order granting a discharge to the insolvent (o), or from an order approving a composition or scheme of arrangement, though his proof has not been admitted at the date of the order, if at the time of appeal his proof has been formally tendered and has not been rejected (p). But a person who merely alleges that he is a creditor, and has omitted for several years to prove his debt, is not a "person aggrieved" by the refusal to make an order the result of which, if made, would be to increase the assets available for the creditors, and is, therefore, not entitled to appeal. It was so held in *Ex parte Ditton* (q). The creditor in that case asked for a further opportunity at the hearing of the appeal to tender his proof, but the Court refused to do so as he had failed to tender his proof for about three years. Cotton, L.J., said: "In my opinion a person aggrieved by such an order must be a person who is in a position to come in and claim a part of that sum if it were brought into the assets—that is, a creditor of the bankrupts; and the appellant has not proved any debt or been recognised as a creditor by any order of the Court." In a Calcutta case (r), where a debtor was adjudged insolvent in Bombay as well as in Calcutta, a creditor whose name was entered as such in the list of creditors supplied to the Official Assignee at Calcutta and who had tendered his proof in Bombay, was held to be a "person aggrieved" by an order granting the debtor his discharge, although he had not tendered his proof in Calcutta. *Ex parte Ditton* was distinguished on the ground that the order in that case merely affected the fund applicable for dividend, while the order of discharge granted by the Calcutta High Court would have a far-reaching effect in that it would release the insolvent not only from all debts provable in insolvency in Calcutta, but also in Bombay (s). The whole position was anomalous for there were two insolvencies proceeding side by side—a position not contemplated by the Act (t). In the course of his judgment Rankin, J., said: "This case is not to my mind on all fours with the case of *Ex parte Ditton* cited to us because here the matter may be tested in this way: suppose the Official Assignee in Bombay had applied to this Court as a 'person

(m) See *Tyeb Ali v. Purna* (1926) 43 Cal. L. J. 219, 93 I.C. 898, ('26) A.C. 618; *Re Surajmull Munghchand* (1921) 26 C.W.N. 803, 70 I.C. 463, ('21) A.C. 403.

(n) See *Ex parte Kearsley* (1886) 17 Q. B. D. 1.

(o) *Ex parte Castle Mail Packet Co.*

(1886) 18 Q. B. D. 154.

(p) *Re Langtry* (1884) 1 Mans. 169.

(q) (1879) 11 Ch. D. 56.

(r) *Kustomjee Dorabjee v. K. D. Brothers* (1926) 53 Cal. 866, 99 I. C. 736, ('27) A. C. 163.

(s) See P.-t. I. A., s. 45.

(t) See P.-t. I. A., s. 22.

aggrieved' by this order on the ground that its operation was to sweep away the Bombay insolvency altogether. It must be that he could have done so in the interest of the Bombay creditors. To my mind, not in his capacity as a creditor who has proved in this insolvency, but in his capacity as a creditor taking part in the other insolvency the appellant has a right to come to this Court and say that the order made by this Court is one which should not have been made. The insolvents actually applied to the Bombay Court to terminate its proceedings on the ground of the order of the learned [trial] Judge." The judgment of Sanderson, C.J., proceeded on the ground that no objection was taken to the appearance of the appellant in the Court below, and he was therefore entitled to appeal.

A creditor may appeal from an order granting protection to the insolvent, though he may not be a decree-holder so as to be in a position to arrest the insolvent if the order were refused (*u*).

793. Appeal against refusal to hear.—If notice of an application proposed to be made by the Official Assignee for directions is given to the insolvent, and the Court refuses to hear the insolvent, the insolvent is a "person aggrieved" and he is entitled to appeal from such refusal (*v*).

794. Order for private examination.—A person who is ordered to be examined under sec. 36 of the Act, is a "person aggrieved" by the order if the order is oppressive or hard upon him (*w*). If he applies to the Court which made the order to review and rescind it [sec. 8 (1)], but the application is refused, he may appeal from the order of refusal (*x*).

795. Contempt of Court.—An insolvent is entitled to appeal as a "person aggrieved" against an order committing him for contempt of Court for wilful failure to deliver up to the Official Assignee property forming part of his estate (*y*).

796. Order for administration in insolvency of estate of person dying insolvent.—A creditor of a deceased person who has taken out an Originating Summons for the administration of the estate of the deceased is a "person aggrieved" by an order for the administration of his estate in insolvency under sec. 108 of the Act (*z*). So is an administrator of the estate of a deceased person who will be put to expense in complying with an order made under that section (*a*), as where there are no assets available for distribution (*b*).

797. Notice to Official Assignee.—O. 58, r. 2, of the Rules of the Supreme Court provides that the notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any of the parties to the proceedings, or upon any person not a party.

(*u*) *Mahomed Haji Essac v. Shaik Abdool Rahiman* (1916) 40 Bom. 461, 31 I.C. 507.

(*v*) *Re Webb and Sons* (1887) 4 Morr. 52.

(*w*) *Re North Australian Territory Co.* (1890) 45 Ch.D. 87, 93, 95.

(*x*) *Re A Debtor* (1917) 1 K.B. 558.

(*y*) *Re Ashwin* (1890) 25 Q. B. D. 271. See P.-t. I. A., s. 33 (4).

(*z*) *Re Kilson* (1911) 2 K.B. 109.

(*a*) *E.g.*, lodging an account of the administration (if any) of the estate, furnishing a list of creditors and a statement of the assets and liabilities. See Cal. Rule 163; Mad. Rules 109, 110; Bom. Rule 165; Rang. Rule 227.

(*b*) *Re Hosking* (1912) 106 L.T. 640.

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In England the Official Receiver must in all cases be served with notice of appeal from a receiving order. But the Official Receiver, though served, ought not to appear at the hearing of the appeal unless there are special circumstances which he desires to bring before the Court, and in the absence of special circumstances he will not be allowed his costs of appearance (c). This rule is not confined to appeals from a receiving order, but applies to all appeals (d). The High Court of Calcutta has held that though there is no provision in the Presidency-towns Insolvency Act or the Rules made under it for such service, it is necessary and desirable to follow the English practice, and that the Official Assignee must in all cases be served with notice of an appeal from an order of adjudication (e). In a case under the Provincial Insolvency Act (f) the question arose whether the Receiver was a necessary party to an appeal against an order of adjudication, and it was held that he was not. As to whether notice of the appeal should be served on the Receiver, the Court said that the English decisions were no guide in cases under the Provincial Insolvency Act. This is, indeed, going too far.

798. Orders which may be made in appeal.—The Divisional Bench of the Court sitting in appeal in an insolvency matter has the power to make the order which it thinks the Judge exercising insolvency jurisdiction ought to have made; the Bench is not confined merely to making a declaration that the order of the Judge exercising insolvency jurisdiction was wrong (g).

799. Security for costs.—The Appellate Court has the power to order security for costs of the appeal under sec. 8 (2) (b) of the Act read with O. 41, r. 10, of the Code of Civil Procedure, 1908 (h).

800. Special leave to appeal.—Where no appeal lies except with the leave of the Judge sitting in insolvency, and leave to appeal is refused, it is competent to the unsuccessful party to apply to the Appellate Court for special leave to appeal (i).

801. Where judges differ in opinion.—Where two Judges of a Division Court differ in opinion in an appeal from an order of a Judge exercising insolvency jurisdiction, the appeal will be governed in Calcutta

(c) *Ex parte Dixon* (1884) 13 Q.B.D. 118; *Re Webber* (1889) 23 Q.B.D. 313.

(d) Rules of the Supreme Court G. 58, r.2; *Ex parte White* (1885) 14 Q. B. D. 600, 603-604 [appeal by bankrupt from order granting discharge on condition of his consenting to judgment being entered up against him]; *Ex parte Reed and Bowen* (1886) 17 Q. B. D. 244 [appeal by debtor from order refusing to approve of scheme of arrangement].

(e) *Khemkarandas Khemka v. Haribuz*

Fatehpuria (1925) 29 C. W. N. 884, 89 I. C. 584, ('25) A.C. 1215.

(f) *Moti Ram v. Kewal Ram* (1927) 9 Lah. L. J. 550, 105 I.C. 569, ('28) A.L. 202.

(g) *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaha* (1929) 56 Cal. 667, 683, 684, 115 I. C. 39, ('28) A.C. 786.

(h) *Lakhipriya Dadi v. Raikishori Dasi* (1915) 43 Cal. 243, 32 I. C. 3.

(i) *Panachand v. Dobson* (1923) 25 Bom. L.R. 161, 72 I.C. 261, ('23) A.B. 245.

Madras and Bombay by the provisions of clause 36 of the Letters Patent and in Rangoon by those of clause 34 (j).

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801-806

802. Appeal to Privy Council.—An appeal lies to the Privy Council under clause 39 of the Letters Patent of Calcutta, Madras and Bombay, from an order made by the High Court in its appellate jurisdiction under sec. 8 of the Act (k).

803. Limitation for appeal from order of officer empowered under sec. 6.—The period of limitation for an appeal from an order made by an officer delegated with powers under sec. 6 is twenty days from the date of the order as provided by sec. 101 of the Act. The time for filing an appeal may be extended under sec. 90 (5) of the Act if sufficient cause is shown.

804. Limitation for appeal from order of Judge exercising insolvency jurisdiction.—The period of limitation for an appeal from an order made by a Judge of the High Court exercising insolvency jurisdiction is twenty days from the date of the order under art. 151 of Sch. 1 to the Indian Limitation Act, 1908. The limitation being governed by the Limitation Act, the time for filing an appeal may be extended under sec. 5 of that Act if sufficient cause is shown (l).

C.—Appeal to Court against Official Assignee.

805. Appeal from decision of Official Assignee to Court [P.-t. I. A., s. 86].—If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, he may appeal to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just.

806. Parallel enactments.—This section is based on sec. 90 of the Bankruptcy Act, 1883, now sec. 80 of the Bankruptcy Act, 1914, and corresponds to sec. 68 of the Provincial Insolvency Act. There was no such provision in the Indian Insolvency Act, 1848 (m). Where an appeal is preferred under sec. 86, a further appeal lies from the order of the Court under sec. 8 (2) (b); but where an appeal is preferred under sec. 8 (2) (a) from an order made by an officer delegated with powers under sec. 6, no further appeal lies except with the leave of the Court.

(j) As to the law before the amendment of the clauses, see *Official Assignee of Madras v. Lupprian* (1911) 34 Mad. 121, 6 I.C. 387.

(k) *Annamalai Chetty v. Official Assignee of Madras* (1925) 35 Mad. L.T. 57, 91 I.C. 126, (25) A.M. 243. As to appeals to Privy Council under Prov. I. A., see *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram* (1913) 40 Cal. 685, 19 I.C.

435.

(l) *Mahomed Haji Essack v. Shaik Abdool Rahiman* (1916) 40 Bom. 461, 465, 31 I.C. 507. See also *Ex parte Tucker* (1879) 12 Ch. D. 308, and Bankruptcy Rules, Rule 130. As to cases under Prov. I. A., see s. 78 of that Act.

(m) See *Official Assignee of Madras v. Ramchandra Iyer* (1910) 33 Mad. 134, 5 I.C. 974; *Rowlandson v. Champion* (1894) 17 Mad. 21.

**Paras.
807-812**

807. Limitation for appeal against Official Assignee [P.-t. I. A., s. 101].—The period of limitation for an appeal from any act or decision of the Official Assignee is twenty days from the date of such act or decision. Under sec. 90 (5) the time for filing an appeal may be extended if sufficient cause is shown. The mode of counting the period of limitation is governed by the Indian Limitation Act, 1908 (n).

808. Who may appeal.—An appeal may be preferred under this section by the insolvent or any of the creditors or any other person aggrieved by the act or decision of the Official Assignee.

809. The insolvent.—The insolvent cannot appeal unless he is "aggrieved" by an act or decision of the Official Assignee. This subject is discussed in para. 790 above, under the head "The insolvent."

809A. Creditor.—See para. 792 above.

810. Any other person aggrieved.—As to who is a person aggrieved, see para. 787 above.

811. Seizure of property of third person by Official Assignee.—When property claimed by a third person is seized by the Official Assignee under sec. 58 (2) of the Act as belonging to the insolvent, such person may proceed by way of appeal under this section or he may bring a regular suit to establish his right to the property. Sec. 86 does not oust the jurisdiction of the ordinary Courts to entertain the suit (o). But if he elects to appeal under sec. 86, and the case is decided, the decision will operate as *res judicata* and it will bar a suit in respect of the same matter (p).

6. Appeals, Revision and Review under Provincial Insolvency Act.

This subject may be considered under three heads, namely :—

- A. Appeals from orders of Court.
- B. Appeal to Court against Receiver.
- C. Appeals from orders of Official Receiver.

A.—Appeals from Orders of Court.

812. Appeals from orders of Court [Prov. I. A., s. 75].—(1) The debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final ; provided that the High Court, for the purpose of satisfying itself that an order made in

(n) See *Arbuthnot & Co. v. Sabapathy Mudaliar* (1912) 23 Mad. L. J. 221, 14 I. C. 579.

(o) *Naginal Chumilal v. Official Assignee* (1911) 35 Bom. 473, 12 I. C. 391; *Re Rassul Haji Cassum*

(1911) 13 Bom. L. R. 13, 9 I. C. 344 [a case under I. I. A., 1848].

(p) *Abdul Latheef v. Official Assignee of Madras* (1917) 40 Mad. 1173, 44 I.C. 847.

any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit ; provided further that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under sec. 4 may appeal to the High Court on any of the grounds mentioned in sec. 100 (1) of the Code of Civil Procedure, 1908.

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I to the Act, come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court.

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

813. Appeals to District Court and High Court.—For the purposes of appeal orders and decisions may be divided into three classes, namely :—

- I. Orders made by a Court subordinate to a District Court.
- II. Orders made by a District Court in appeal from an order of a subordinate Court.
- III. Orders made by a District Court otherwise than in such appeal.

These again may be sub-divided into—

- (1) orders specified in Schedule I of the Act ; and
- (2) other orders.

I. Every order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court is appealable to the District Court.

II. Every order made by a District Court in appeal from an order of a subordinate Court is final except that where an order is made under sec. 4, an appeal lies from it to the High Court on any of the grounds mentioned in sec. 100 (1) of the Code of Civil Procedure, 1908. But though no appeal lies to the High Court from an order made by a District Court in appeal except in the case mentioned above, the High Court, for the purpose of satisfying itself that an order made in appeal by the District Court was according to law, may call for the case and pass any such order with respect thereto as it thinks fit.

Sec. 4 deals with questions of title, priority, etc. Sec. 100 (1) of the Code provides for a second appeal to the High Court if the decision is contrary to law, etc.

III. (1) Every order made by a District Court otherwise than in appeal from an order of a subordinate Court, which is specified in Schedule I to the Act, is appealable to the High Court. (2) Orders other than those specified in that Schedule are appealable only by leave of the District Court or of the High Court.

**Paras.
813-815**

Summarizing the above it may be said that an appeal lies to the High Court in the following cases :—

- (1) from an *appellate* order of a District Court, if the order of the subordinate Court was one made under sec. 4 and the appeal is preferred on one of the grounds mentioned in sec. 100 (1) of the Code ;
- (2) from an *original* order of a District Court—
 - (i) if the order is one specified in Schedule I to the Act ;
 - (ii) if not so specified, with leave of the District Court or of the High Court.

Schedule I specifies certain orders made under secs. 4, 25, 26, 27, 33, 35, 37, 41, 50, 53 and 54 of the Act (pl.)

814. Changes in the law.—This section corresponds to sec. 46 of the Provincial Insolvency Act, 1907, and introduces the following alterations in the law :—

(1) Under sec. 46 the right of appeal was given “to any person aggrieved” by an order. Under the present section the right of appeal is given to “the debtor, any creditor, the Receiver or any other person aggrieved” by an order.

(2) The second proviso to sub-sec. (1) is new.

(3) The first and third items in Sch. I to the Act are also new. The first item relates to decisions of questions of title, priority, etc., under sec. 4 of the Act. The third item relates to orders awarding compensation under sec. 26 of the Act.

815. Court subordinate to a District Court.—Sec. 3 of the Act provides that the District Courts are to be the Courts having jurisdiction under the Act. At the same time power is given by that section to the Local Government to invest any Court, by notification in the local Official Gazette, with jurisdiction in any class of cases, and any Court so invested is to have within the local limits of its jurisdiction concurrent jurisdiction with the District Court under the Act. But though a Court so invested has concurrent jurisdiction with the District Court, it is nevertheless for the purposes of appeal a Court subordinate to the District Court, so that an appeal lies from its orders not to the High Court, but to the District Court (q). An Additional District Judge, however, exercising insolvency jurisdiction as part of the functions assigned to him by the District Judge under the Bengal, N.-W. P. and Assam Civil Courts Act, 1887, is not a Court subordinate

(pl) The entry relating to s. 69 was repealed by the Repealing Act, 1927 (12 of 1927).

(q) *Chatturbhuj Mehesri v. Harlall Agarwalla* (1925) 80 I.C. 858, (25) A.C.

335; *Madhorao Deorao v. Nago* (1923) 71 I. C. 37, (23) A. N. 80. See also *Digendra Chandra Basak v. Ramani Mohan Goswami* (1918) 22 C. W. N. 958, 48 I. C. 333.

to the District Court, and an appeal lies from his orders not to the District Court but to the High Court. Such a Judge does not require to be invested with insolvency jurisdiction by any notification of the Local Government (r).

Paras.
815-817

816. Who may appeal.—The persons entitled to appeal under this section are the debtor, any creditor, the Receiver or any other person aggrieved by an order. Unless the debtor or creditor or Receiver or any other person is a “person aggrieved,” he cannot appeal from the order.

It is a peculiarity of the law of bankruptcy that not only a person who is a party to an order, but also any person who is aggrieved thereby, is entitled to appeal from the order, even if he is not a party to it. The reason is that proceedings in bankruptcy affect not only the parties thereto but also other people (s).

817. Person aggrieved.—The expression “person aggrieved” has been taken from the corresponding section of the English Bankruptcy Acts (t). The meaning of that expression was explained in *Ex parte Sidebotham* (u) by James, L.J., a great authority on the law of bankruptcy, in these terms: “It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words ‘person aggrieved’ do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A ‘person aggrieved’ must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.” Two expressions in this classical judgment were further explained by Lord Esher, M.R., in *Ex parte Official Receiver* (v). As to the expression “legal grievance” the Master of the Rolls said that the grievance suffered must be a *legal* grievance: a pecuniary grievance, or a grievance to property or person, may not of itself be a legal grievance. As to the expression “wrongfully refused him something” he said: “It cannot mean wrongfully refusing him something unless it be a refusal of something for which he had a *right* to ask, so that that definition of James, L.J., would mean a ‘person aggrieved’ must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a *right* to demand.” The definition of James, L.J., has been followed in almost every case both English and Indian in which the question arose whether a person was a “person aggrieved” so as to entitle him to appeal.

- (r) *Makhan Lal v. Sri Lal* (1912) 34 All. 382, 14 I. C. 162. See also *Mul Chand v. Murari Lal* (1914) 36 All. 8, 21 I. C. 702.
(s) *Re Michael* (1891) 8 Morr. 305; *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaba* (1929) 56 Cal. 667, 679, 115 I. C. 39,

- (t) *28 A. C. 786; Chowdappa Gounder v. Kathaperumal Pillai* (1926) 49 Mad. 794, 96 I. C. 914, (26) A. M. 801.
(u) *B. A., 1869, s. 71; B. A., 1883, s. 104; B. A., 1914, s. 108.*
(v) (1880) 14 Ch. D. 458, 465.
(v) (1887) 19 Q. B. D. 174, 177.

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817, 818**

Ex parte Sidebotham (w), referred to above, was a case under the Bankruptcy Act, 1869. In that case the Comptroller in Bankruptcy made a report that the trustee in bankruptcy had been guilty of misfeasance, by which the estate had suffered a loss of £1,253, that he had called upon the trustee to make good the loss, but that he failed to do so, and applied to the County Court to enforce the requisition against the trustee. The Court refused to make any order. The Comptroller did not appeal from this refusal, but the bankrupt Sidebotham, who had not obtained his discharge, appealed. It was contended on behalf of the bankrupt that if the trustee had been ordered to pay the £1,253, the estate would have paid a dividend of more than 10s. in the pound, and then, under sec. 48 of that Act, the bankrupt would have been entitled to his discharge. But this argument was not accepted and it was held that the bankrupt was not a "person aggrieved" and had no *locus standi* to appeal. "In the present case," said James, L.J., "no one is prejudiced by the refusal of the Court to act on the Comptroller's report, *except in so far as he has lost any benefit which he might have obtained if an order had been made*; there is nothing to embarrass him in any proceedings which he may wish to take against the trustee. If there has been any misfeasance on the part of the trustee, the bankrupt or any creditor has a right under sec. 20 to apply to the Court, not because the Comptroller has made a report to the Court, but because he is entitled to make his own case against the trustee" (x).

Any person who asks for a decision from a Court which he had a *right* to ask, or any person who is brought before a Court to submit to a decision, is, if the decision goes against him, a "person aggrieved" by the decision (y).

818. The debtor.—The debtor may appeal if he is a "person aggrieved" but not otherwise.

On the making of an order of adjudication, the whole of the property of the insolvent vests in the Receiver. The insolvent has no legal interest in the property vested in the Receiver and no *locus standi* in the administration of his estate. "A bankrupt can do nothing to embarrass the administration of his estate." Even as regards the surplus he has no property in it. He has nothing more than a mere hope or expectation in it (z). He cannot therefore be a "person aggrieved" by any act of the Receiver in the course of the administration of his estate. If any part of his property is sold by the Receiver, he cannot apply under sec. 68 to set aside the sale on the ground that the sale was prejudicial to him, for he has no

(w) (1880) 14 Ch. D. 458.

(x) *Ex parte Sidebotham* (1880) 14 Ch. D. 458, 466.

(y) *Re Lamb* (1894) 2 Q. B. 805, 812; *Ex parte Official Receiver* (1887) 19 Q. B. D. 174, 178; *Ketokey*

Charan Banerjee v. Sreemutty Sarat Kumari Dabee (1916) 20 C. W. N. 995, 37 I. C. 71.

(z) *Ex parte Sheffield* (1879) 10 Ch. D. 434; *Re Leadbitter* (1878) 10 Ch. D. 388.

interest in the property. The application under sec. 68 being incompetent in the first instance, the District Court, if it entertains it, has no power to grant leave to appeal from its decision to the High Court (a). It has been held in a Madras case that an insolvent is entitled as a "person aggrieved" to appeal against an order admitting a person as a creditor. The decision was based on the ground that he would eventually be entitled to the surplus and would be deprived of the surplus if the proof of a person claiming to be a creditor was admitted (b). The ground on which the decision proceeded was disapproved in a subsequent Full Bench case of the same High Court (c), but the Bench refrained from expressing any opinion on the decision itself. Both these cases were prior to the Provincial Insolvency (Amendment) Act 39 of 1926. Since the amendment of sub-sec. (3) of sec. 33 by that Act, whereby the word "Receiver" was substituted for the word "insolvent" in that sub-section, there can hardly be any doubt that the insolvent is not entitled as a "person aggrieved" to appeal against an order admitting a person as a creditor (d).

Where on an application by the Receiver for directions notice is served upon the insolvent, but at the hearing the Court refuses to hear him, he is a "person aggrieved" and entitled to appeal from the refusal (e).

Sec. 28 (5) of the Act provides that the property of the insolvent which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree does not vest in the Receiver. If the Insolvency Court directs any such property to be sold, the insolvent is a "person aggrieved" and is entitled as such to appeal from the order (f).

819. Creditor.—Sec. 46 of the Provincial Insolvency Act, 1907, gave a right of appeal to "any person aggrieved" by an order. In the present section those words have been amplified into "the debtor, any creditor, the Receiver or any other person aggrieved" by an order. This does not mean that a creditor can appeal in any case. He cannot appeal unless he is a "person aggrieved".

Cases in which the question has arisen whether a creditor is a "person aggrieved", and as such entitled to appeal, fall into three classes, namely:—

- I. Where the order complained of affects only an individual creditor and his interest.

- (a) *Sakhawat Ali v. Radha Mohan* (1919) 41 All. 243, 49 I. C. 816.
 (b) *Sivasubramania v. Theethiappa* (1924) 47 Mad. 120, 75 I. C. 572, ('24) A. M. 163.
 (c) *Hari Rao v. Official Assignee, Madras* (1926) 49 Mad. 461, 94 I. C. 642, (26) A. M. 556.
 (d) See also Prov. I. A., 1920, sec. 50; *Re Benoist* (1909) 2 K. B. 784;

- Ganga Sahai v. Mukarram Ali Khan* (1926) 24 All. L. J. 441, 97 I. C. 556, ('26) A. A. 361.
 (e) *Re Webb and Sons* (1887) 4 Morr. 52.
 (f) *Arman Sardar v. Satkhira Joint Stock Co., Ltd.* (1913) 18 Cal. L. J. 564, 20 I. C. 273; *Ram Chand v. Shop Mohra Shah* (1929) 11 Lah. L. J. 198, 119 I. C. 427, ('29) A. L. 622.

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II. Where the order affects the insolvent's estate adversely.

III. Other orders.

I. Where the order complained of affects an individual creditor alone and his interest, he alone is the "person aggrieved" and he alone may appeal. Thus if a creditor's proof is not admitted in full, or if a creditor claims to be a secured creditor and his claim is disallowed, he is a "person aggrieved" and he alone is entitled to appeal.

II. Where the order complained of adversely affects the insolvent's estate, as where a claim made by a third person against the estate is allowed or a claim made by the Receiver against a third person, *e.g.*, under sec. 53 or sec. 54 of the Act, is disallowed, the question arises whether the Receiver alone is entitled to appeal or whether an appeal may be preferred by any one creditor as a "person aggrieved." The view taken in several cases under the Provincial Insolvency Act, 1907, was that creditors could not in insolvency proceedings act individually and independently for they were represented by the Receiver and he alone could take action. Where, therefore, the interests of the whole body of creditors were homogeneous, the Receiver alone, it was said, could prefer an appeal, and not individual creditors. Some of the decisions proceeded on the ground that a creditor in such cases was not a "person aggrieved" within the definition of that expression in *Ex parte Sidebotham* (r) [see p. 544 above]. In some cases the Courts were influenced by the consideration that though the words "any of the creditors" occurred in sec. 22 (now sec. 68) which related to appeals from decisions of the Receiver, those words were not used in sec. 46 which related to appeals from orders of Courts, and an individual creditor therefore could not appeal from an order of the Court in such cases. The present section (sec. 75) contains the words "any creditor" which did not occur in sec. 46 of the Act of 1907. The difficulty, however, has not completely disappeared as will be seen from what follows.

Cases under this head fall broadly into two classes, namely:—

1. Where a claim is made by a third person against the estate of the insolvent and the claim is allowed by the Court of first instance.
2. Where an application is made to set aside a voluntary transfer under sec. 53 or a transfer by way of fraudulent preference under sec. 54, and the application is dismissed by the Court of first instance.

1. *Claims by third persons against estate.*—The High Court of Allahabad **Para. 819.** has held in *Niadar v. Ramji Lal* (s), a case under the Provincial Insolvency Act, 1920, that a creditor of an insolvent is a “person aggrieved” by a decision (under sec. 4) that property attached by the Receiver under sec. 56 as belonging to the insolvent and claimed by a third person as his own belongs to such person. The creditor, it was said, was a “person aggrieved” because the operation of the decision, if it stood, was to reduce the estate out of which he was entitled to a dividend. In an Allahabad case under the Provincial Insolvency Act, 1907, sec. 46, it was held upon facts exactly similar that the creditor was not a “person aggrieved” and that the Receiver alone could appeal and that if no Receiver was appointed the Court should appoint a particular creditor to represent the interests of the general body of creditors (t). As to this case it was said in *Niadar v. Ramji Lal*, that it was a case under the Act of 1907 and that sec. 46 did not contain the words “any creditor” which occur in sec. 75 of the present Act. It seems that in *Niadar v. Ramji Lal* the Receiver was not even a party respondent to the appeal. This raises the question whether if the creditor were unsuccessful in the appeal, the decision would bind the Receiver or other creditors. Clearly it could not unless it be said that the appellant was entitled to represent all other creditors and did in fact represent them. This difficulty was felt in a Madras case (u) under sec. 53 of the Act, where also the appeal was preferred by a creditor. To get over the difficulty the memorandum of appeal was ordered to be amended so as to make the appeal one on behalf of all the creditors on the analogy of a representative suit under sec. 53 of the Transfer of Property Act, 1882. This, indeed, is a queer procedure. Where there is a Receiver appointed by the Court who represents the whole body of creditors (as there was in the Madras case), it is difficult to understand why the Court should go in search of analogies.

According to the English law the trustee represents all the creditors, and all proceedings relating to the estate of the bankrupt must be taken by him or in his name. If he refuses to act, or to allow his name to be used, any creditor may apply to the Court for leave to use his name on giving him an indemnity against costs. The leading case on the subject is *Ex parte Kearsley* (v). In that case the statutory majority of the creditors passed a resolution directing the trustee in bankruptcy not to take any steps to set aside a settlement executed by the bankrupt. The dissentient minority, being trade creditors whose claims amounted to 18,000*l.*, wished that proceedings should be taken, and the trustee refusing to move in the matter,

(s) (1925) 47 All. 849, 88 I. C. 944,
(‘25) A. A. 549; *Shikri Prasad v. Aziz Ali* (1922) 44 All. 71, 63 I. C. 601, (‘22) A. A. 196.

(t) *Jhabba Lal v. Shib Charan Das*

(1917) 39 All. 152, 37 I. C. 76.

(u) *Choudappa Gounder v. Kathaperumal Pillai* (1926) 49 Mad. 794, 96 I. C. 944, (‘26) A. M. 801.

(v) (1886) 17 Q. B. D. 1.

Para. 819 they applied to the Court in their own names for a declaration that the settlement was void as against the trustee (*w*). It was argued for the trustees of the settlement that the applicants though creditors had no *locus standi*, for if the trustee in bankruptcy refused to act, they should have applied to the Court to use his name. On the other hand it was argued for the applicants, on the authority of *Ex parte Sidebotham* (*x*), that a creditor was a "person aggrieved" and as such entitled to appeal, and that there was nothing in the Bankruptcy Act or the Rules framed under it which required that leave to make the application should first be obtained. But this argument was not accepted and on the application of counsel for the applicants the notice of motion was allowed to stand over with liberty to the applicants to apply for leave to use the name of the trustee on giving him a proper indemnity. In the course of his judgment, Cave, J., a great authority on bankruptcy law, said: "It is monstrous that any creditor, however small the amount of his debt, who is dissatisfied with the conduct of the trustee, should be at liberty to launch a motion like this. Such a course is full of inconvenience, is not supported by any authority, and must not be adopted. . . . The proper course, as I have said, is to make a preliminary application for leave to use the name of the trustee on indemnifying him against costs." The learned Judge did not say that the applicants were not "persons aggrieved" within the definition in *Ex parte Sidebotham*. What he did say in effect was that the trustee represented all the creditors, and any proceeding in bankruptcy relating to the estate of the bankrupt must be taken by him or in his name. This principle has been embodied in sec. 54A inserted in the Act by Act XXXIX of 1926. It is submitted that the rule contained in sec. 54A should be followed in the case of adverse claims made by third persons against the estate of the insolvent both as regards original applications and appeals. See the next sub-paras.

2. *Voluntary transfers and fraudulent preference*.—It is now provided by sec. 54A, which was inserted in the Act by Act 39 of 1926, that a petition for the annulment of any transfer made under sec. 53, or of any transfer or payment under sec. 54, may be made by the Receiver or, with the leave of the Court, by any creditor who has proved his debt and who satisfies the Court that the Receiver has been requested and has refused to make such petition. This is in accordance with the English practice stated in the preceding paragraph with this difference that instead of leave being granted to use the Receiver's name on indemnifying him against costs, leave is granted to the creditor to make a petition in his own name. The petition, though in the name of an individual character, would be one by the creditor in his representative character and the decision on the petition would bind the Receiver and all other creditors.

(*w*) See Prov. I. A., 1920, s. 53.

| (*x*) (1880) 14 Ch. D. 458.

Before sec. 54A was introduced, there was a conflict of decisions whether a creditor was entitled to apply to set aside transfers under secs. 53 and 54. It was held in some cases that he was. In some cases it was held that he was not, and that the Receiver alone was entitled to apply under those sections, and if he refused, a creditor could apply to the Court to allow him to use the name of the Receiver. Sec. 54A sets the conflict at rest.

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As regards appeals from orders under secs. 53 and 54 it has been held by the High Court of Madras in cases which arose before the amendment that even if a creditor could not *initiate* a proceeding under those sections, he was entitled to *appeal* from an order upholding the transfer as a "person aggrieved" (y), even if the Receiver was not moved to appeal (z), provided the Receiver was joined as a party respondent to the appeal. In the case last mentioned the Court, realizing that no individual creditor in such a case had a right to represent the whole body of creditors, directed the memorandum of appeal to be amended so as to make it clear that the appeal was on behalf of the general body of creditors, on the analogy of a suit under sec. 53 of the Transfer of Property Act, 1882. Sec. 54A applies in terms to an original petition to set aside a transfer. It indicates, however, the procedure to be followed in the case also of an appeal. Under the Presidency-towns Insolvency Act the Official Assignee alone is entitled to move under the corresponding secs. 55 and 56, and if his application is dismissed, to appeal against the dismissal. There is, however, a conflict of decisions as to what course should be adopted if he refuses to do so. According to the Calcutta decisions, any creditor may apply to the Court for leave to appeal in his own name as representing the general body of creditors (z1). According to the Rangoon decision, no such leave can be granted, and the only remedy of the creditor is to appeal against the refusal of the Official Assignee under sec. 86 of the Act (z2). The Calcutta view is the correct one.

If no Receiver has been appointed, the Court itself can move under secs. 53 and 54 on the matter being brought to its notice by a creditor. But when it comes to a question of appeal, the proper course is for the Court to appoint a particular creditor to represent the whole body of creditors. A decision in an appeal filed by such a creditor will bind the estate.

III. The third class of cases comprises orders such as an order of discharge or a protection order. In cases belonging to this class any creditor may appeal as a "person aggrieved." Thus an unpaid creditor may

(y) *Ananthanarayana Ayyar v. Sankaranarayana Ayyar* (1924) 47 Mad. 673, 79 I.C. 395, ('24) A.M. 345. In this case the Court relied on *Re Webb* (1876) 2 Ch. D. 326, but that was a case under sec. 125 of the Bankruptcy Act, 1869, which provided for liquidation by arrangement. No trustee in bankruptcy was appointed, but a trustee only under the scheme of liquidation.

(z) *Chowdappa Gounden v. Kathaperumal Pillai* (1926) 49 Mad. 794, 96 I.C. 944, ('26) A.M. 801.

(z1) *See Tyeb Ali v. Purna* (1926) 43 Cal. L. J. 219, 93 I.C. 898, ('26) A.C. 618; *Re Surajmull Munghchand* (1921) 28 C.W.N. 803, 70 I.C. 463, ('21) A.C. 403.

(z2) In the matter of the Estate of P. A. Mohamed Ganny (1927) 5 Rang. 375, 104 I.C. 89, ('27) A.R. 284.

Para. 819 appeal against an order granting discharge to the insolvent (*g*), or an order approving a composition or a scheme, though his proof has not been admitted at the date of the order, if at the time of appeal his proof has been formally tendered and has not been rejected (*h*). In the one case the operation of the order is to preclude him from all remedy against the insolvent and to limit his rights to a payment of a dividend out of the insolvent's estate (*i*). In the other case the operation of the order is to limit his rights under the composition or scheme (*j*). Similarly a creditor who has tendered his proof may appeal from an order annulling an adjudication under sec. 41 of the Act owing to the failure of the insolvent to apply for his discharge within the time specified by the Court (*k*), or from a protection order (*l*). A person, however, who merely alleges that he is a creditor, but who has omitted for several years to prove his debt, is not a "person aggrieved" (*m*). In the case last cited the Court refused to give further time to the appellant to tender his proof on the ground of laches on his part in establishing his character of "creditor".

Sec. 43 (2) of the Provincial Insolvency Act, 1907, empowered the Court, if the insolvent was guilty of any of the offences mentioned in it, to sentence him to simple imprisonment for a term which might extend to one year. It was held in cases under that Act that where the Court refused to frame a charge against the insolvent on the complaint of a creditor, the creditor was not a "person aggrieved" and was not therefore entitled to appeal from the refusal (*n*). The ground of the decisions was, that as pointed out in *Ex parte Official Receiver* (*o*), a "person aggrieved" must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand, while a creditor has no right to put the Court in motion under sec. 43 (2) although the Court may avail itself of the assistance which he may render (*p*). It was also held that even if the complaint was made by the Receiver, he would not be a "person aggrieved" for he was merely the representative of the creditors and just as a creditor could not appeal, so he also could not (*q*). The same principles, it seems, would apply to cases under secs. 69 and 70 of the present Act.

(*g*) *Ex parte Castle Mail Packet Co.* (1886) 18 Q. B. D. 154.

(*h*) *Re Langtry* (1894) 1 Mans. 169.

(*i*) *Ex parte Castle Mail Packet Co.* (1886) 18 Q. B. D. 154, at p. 158, *supra*.

(*j*) *Re Langtry* (1894) 1 Mans. 169, at p. 171, *supra*.

(*k*) See *Abbi Reddi v. Venkata Reddi* (1926) 51 Mad. L. J. 60, 94 I. C. 351, ('27) A. M. 175.

(*l*) *Mahomed Haji Essack v. Shaik Abdool Rahiman* (1916) 40 Bow. 461, 31 I. C. 507; *Jai Singh v. Narmal Das* (1926) 7 Lah. L. J. 553 ('26) A. L. 24, 92 I. C. 235.

(*m*) *Ex parte Dillon* (1879) 11 Ch. D. 56, distinguished in *Rustomjee Dorab-*

jee v. K. D. Brothers (1926) 53 Cal. 866, 880, 99 I. C. 736, ('27) A. C. 163.

(*n*) *Ladu Ram v. Mahabir Prasad* (1917) 39 All. 171, 37 I. C. 996; *Iyappa Nainar v. Manicka Asari* (1917) 40 Mad. 630, 27 I. C. 241; *Palanappa Chetty v. Subramania Chetty* (1920) 38 Mad. L. J. 338, 54 I. C. 740; *Digendra Chandra Basak v. Ramani Mohan* (1918) 22 C. W. N. 958, 48 I. C. 333.

(*o*) (1887) 19 Q. B. D. 174.

(*p*) (1920) 38 Mad. L. J. 337, at p. 339, 54 I. C. 740, *supra*.

(*q*) *Bhagwant Kishore v. Sanwal Das* (1921) 19 All. L. J. 701, 61 I. C. 802, ('21) A. A. 246.

820. Receiver.—Where an application is made by the Receiver as representing the estate but the application is refused, the Receiver is a “person aggrieved” and is as such entitled to appeal (a). As regards wrongs personal to the Receiver, he is entitled to appeal if he comes within the definition of a “person aggrieved” in *Ex parte Sidebotham* referred to in paragraph 817 above. Thus where an Official Receiver was appointed Receiver of an insolvent’s estate, but he was removed the next day, and another person was appointed Receiver in his place, it was held that he was a “person aggrieved” and was as such entitled to appeal (b). But a Receiver is not a “person aggrieved” merely because an adjudication has been annulled; he cannot therefore appeal from the annulment, though if he is dissatisfied with the commission awarded to him up to the date of the annulment, he may appeal from it (c). Nor is he entitled to appeal from the refusal of the Court to frame a charge against the insolvent on his application under sec. 43 (2) of the Provincial Insolvency Act, 1907 (d). See para. 819 above, “Creditor.”

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821. Any other person aggrieved.—Beside the debtor and creditors, any person may appeal from an order or decision if he comes within the definition of a “person aggrieved” in *Ex parte Sidebotham* dealt with in para. 817 above. The expression “any other person” includes a person against whom a decision is given under sec. 4 which relates to questions of title, priorities, etc., or sec. 28 (7) which relates to the relation back of the Receiver’s title, or sec. 53 which relates to voluntary transfers, or sec. 54 which relates to fraudulent preferences (e). See para. 817 above.

822. Questions of title under sec. 4 and second appeal [sec. 75 (1), second proviso].—Sec. 4 of the Act empowers the Court “to decide all questions whether of title or of priority, or of any nature whatsoever, which may arise in any case of insolvency coming within the cognizance of the Court.” Decisions on questions of title, etc., under sec. 4 fall into two classes, namely:—

- (1) decisions by a District Court on appeal from a subordinate Court; and
- (2) decisions by a District Court otherwise than in appeal from a subordinate Court.

In case (1) a second appeal lies to the High Court on any of the grounds mentioned in sec. 100 (1) of the Code of Civil Procedure, 1908. This in fact is the only case in which a second appeal is allowed under the Act. In case (2)

(a) *Ex parte Official Receiver* (1887) 19 Q. B. D. 174.

(b) *Official Receiver, Tanjore v. Nataraja Sastrial* (1923) 46 Mad. 405, 72 I. C. 225, ('23) A. M. 355.

(c) *Radha Mohan v. Ghasi Ram* (1917) Punj. Rec. No. 93, p. 368, 41

I. C. 96.

(d) *Bhagwant Kishore v. Sanwal Das* (1921) 19 All. L. J. 701, 61 I. C. 802, ('21) A. A. 246.

(e) See *Algappa Chettiar v. Vellachani Servai* (1928) 112 I. C. 623, ('28) A. M. 981.

Para. 822 an appeal lies to the High Court *on any ground*. The grounds mentioned in sec. 100 (1) of the Code are that the decision is contrary to law, or that the decision has failed to determine some material issue of law, or that there has been a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon the merits. Putting the above in another form, it may be said as regards orders under sec. 4 that—

- (1) there is a second appeal to the High Court from the *appellate* order of the District Court if the appeal is one on a question of law or any other ground mentioned in sec. 100 (1) of the Code. This is under the second proviso to sub-sec. (1);
- (2) there is a first appeal *as of right* to the High Court from the *original* order of a District Court whether the question to be decided by the High Court is one of law or of fact. This is under sub-sec. (2). See para. 824 below.

The question which assumes importance in the class of cases now under consideration is whether the decision appealed from is one under sec. 4. If it is, an appeal lies to the extent mentioned above. What then are questions of title within the meaning of sec. 4?

The questions which the Court is empowered to decide under sec. 4 are “all questions whether of *title* or *priority* or of *any nature whatsoever*,” etc.

Questions of title.—Questions under sec. 53 which relate to voluntary transfers are questions of title within the meaning of sec. 4. Therefore, if an application is made by the Receiver to a subordinate Court under sec. 53 to set aside a transfer, and the transfer is set aside, and the decision is confirmed in appeal by the District Court, a second appeal lies at the instance of the transferee to the High Court under the second proviso to sec. 75 (1), if the question involved is one of law. The Receiver also may appeal if the decision is against him (*f*). The question whether a deed of gift made by the insolvent more than two years before the presentation of the petition is fraudulent and void as against the Receiver under sec. 53 of the Transfer of Property Act, 1882, is also a question of title within the meaning of sec. 4. Therefore, if property transferred by way of gift by the insolvent to his wife is advertised for sale by the Receiver as the property of the insolvent, and if the wife applies to the Subordinate Judge, and the Judge upholds the gift as *bona fide*, and the Receiver appeals to the District Judge who sets aside the gift as being in fraud of creditors, the wife is entitled to prefer a second appeal to the High Court if a point of law is involved (*g*). The same rule applies where the transfer impeached is in the form of a sale (*h*). See para. 824 below.

- (f) *Lalji Sahai Sing v. Abdul Gani* (1910)
15 C. W. N. 253, 7 I. C. 765;
Seth Sheolal v. Girdharilal. ('24)
A. N. 361, 78 I. C. 140.
(g) *Fool Kumari Dasi v. Khirad Chan-*

- dra Das Gupta* (1927) 31 C.W.N.
502, 102 I. C. 115, ('27) A.C. 474.
(h) *Shikri Prasad v. Hafiz Aziz Ali*
(1922) 44 All. 71, 63 I.C. 601, ('22)
A.A. 196.

Questions of any nature whatsoever.—Under sec. 4 the Court has the power to decide all questions whether of title or priority or “of any nature whatsoever.” An order annulling an adjudication under sec. 43 owing to the insolvent’s failure to apply for his discharge within the time fixed by the Court under sec. 27, is not a decision on a question of title. There is a conflict of opinion whether it is a decision on a question “of any nature whatsoever” within sec. 4. In a Madras case *Ramesam, J.*, expressed the opinion that it is (i). In a later Madras case (j), it was held that it is not, and this, it is submitted, is the correct view. In the last mentioned case *Pakenham Walsh, J.*, said: “To say that this order is passed under sec. 4 amounts to saying that every order under the Act can be brought under sec. 4 and that therefore a second appeal lies on a question of law against every order passed under the Act. That is to render the Schedule and the plain proviso of sec. 75 (2) meaningless.”

Refusal to decide questions of title.—Refusal to decide questions of title under sec. 4 is appealable as much as a decision under that section. Thus if property claimed by the Receiver as belonging to the insolvent is claimed by a third person as his own, and the District Judge without deciding the question of title directs the property to be sold subject to the claim of such person, an appeal lies to the High Court under sec. 75 (2) of the Act (k).

823. Value of property for purposes of appeal.—Irrespective of the value of property involved an appeal lies under sec. 75 (1) to the District Court against a decision of a Subordinate Judge on a question under sec. 4, and a second appeal lies to the High Court. Sec. 5 (2) of the Act does not import into the Act the provisions regulating appeals to different Courts according to the value of the claim or the property involved (l).

824. Appeal as of right from original order of District Court [sec. 75 (2)].—Sec. 75 (2) gives a right of appeal to the High Court from an *original* order of a District Court if the order is one made under any of the sections specified in Schedule I to the Act. Amongst those sections is sec. 4 which relates to questions of title. Where property is seized by the Receiver as belonging to the insolvent and an application is made under sec. 68 to the District Court by a third person claiming the property as his own, the decision of the District Court, whether it allows or disallows the claim of such person, is a decision on a question of title within sec. 4, and an appeal lies to the High Court from such decision as a matter of right under sec. 75 (2) of the

- (i) *Kallukutti Parambath Perachan v. Puthen Peetikakkal Kuttiali* (1925) 49 Mad. L. J. 595, 91 I. C. 144, ('26) A. M. 123.
(j) *Sambamurthi Ayyar v. Ramakrishna Ayyar* (1929) 52 Mad. 337, 114 I. C. 847, ('29) A. M. 43.

- (k) *Nayan Tara Dasi v. Sambhu Nath Midhya* (1925) 52 Cal. 662, 89 I. C. 761, ('25) A. C. 932.
(l) *Fool Kumari Dasi v. Khirad Chandra Das* (1927) 31 C.W.N. 502, 102 I. C. 115, ('27) A. C. 474.

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Act (m). Similarly where property belonging to the insolvent's sister, which would have passed to the insolvent had it not been disposed of by her by a will, is attached by the Receiver on the allegation that the will is a forgery, and the legatees apply to the District Court claiming that the property should be restored to them, the decision of the District Court that the will is not a forgery and releasing the property from attachment is a decision on a question of title within sec. 4, and the Receiver is entitled to appeal to the High Court from the decision as of right under sec. 75 (2) of the Act (n). On the same principle if a purchaser of property deposits the purchase-money with a third person to be paid to the vendor on registration of the deed of sale, and before registration the vendor becomes insolvent, an order made by the District Court, directing the purchase-money to be paid to the Receiver, is one deciding a question of title, and the purchaser is entitled to appeal from the order to the High Court as of right under sec. 75 (2) of the Act (o).

825. Appeal with leave from original orders of District Court [sec. 75 (3)].—A person aggrieved by an *original* order of a District Court other than an order specified in sec. 75 (2), may appeal to the High Court by leave of the District Court or of the High Court. It appears from the decisions that he is not bound to apply for leave in the first instance to the District Court. He may apply for leave to the High Court. No difficulty arises where leave has been obtained from the District Court.

Leave when to be obtained.—Where no application for leave has been made to the District Court, it may be made to the High Court. Where leave is obtained at the time of the admission of the appeal, no difficulty arises. Where leave is not obtained at that time, the question arises whether the admission of the appeal is in itself tantamount to the granting of leave, and, if it is not, whether leave may be granted after the admission of the appeal.

There is a conflict of opinion whether the mere admission of an appeal amounts to the granting of leave to appeal. In a Patna case it was held that if the appeal is admitted, and it is proceeded with as if leave was granted, it is tantamount to the granting of leave (p). In a Lahore case it was held that it was not (q). In a later Lahore case, where the petition

- (m) *Ghani Muhammad v. Dina Nath Puri* (1928) 108 I. C. 602, ('28) A. L. 556. See also *Chittammal v. Ponnuswami Naicker* (1926) 46 Mad. 762, 92 I. C. 573, ('26) A. M. 363.
(n) *Kali Charan v. Mohammad Jamil* (1930) 30 All. L. J. 588, 122 I. C. 762, ('30) A. A. 498.
(o) *Munshi Ram v. Sheikh Ghulam Dastgir* (1928) 107 I. C. 400, ('28)

- A. L. 423.
(p) *Gopal Ram v. Magni Ram* (1928) 7 Pat. 375, 378, 107 I. C. 380, ('28) A. P. 338.
(q) *Thakur Singh v. Ganga Singh* (1927) 9 Lah. L. J. 257, 259, 103 I. C. 623, ('27) A. L. 424. The case seems to have been one under sec. 4; if so, no leave was necessary.

for appeal included a prayer for leave, and the appeal was admitted without specifically stating that leave was granted, it was held that the appeal must be deemed to have been filed with the leave of the Court (r). Even if no leave is obtained before the filing of the appeal, the High Courts of Madras (s), Allahabad (t), and Patna (u) would, if the case is a fit one for appeal, grant leave at the hearing of the appeal, though the application for leave is made at a late stage of the proceedings (v). In one case, however, the Lahore High Court refused to grant leave on the ground that it was not applied for till practically the whole case had been argued on both sides (w), though the case, it would seem, was a fit one for appeal. The High Court of Madras has gone the length of holding that if the appeal has been preferred within the period of limitation (i.e., ninety days from the date of the order), the application for leave to appeal may be granted even if it is made after the period of limitation for the appeal has expired; and, further, that even if an appeal cannot be deemed to have been filed until leave is granted, the Court may under sec. 78 extend the period for the filing of the appeal (x).

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Concurrent jurisdiction of the High Court to grant leave.—Under the English law where the order is made by a County Court, an appeal lies to a Divisional Court of the High Court. The decision of the Divisional Court upon any such appeal is final and conclusive, “unless in any case the Divisional Court or the Court of Appeal sees fit to give special leave to appeal therefrom to the Court of Appeal,” whose decision in such case shall be final and conclusive (y). It has been held in England that the application for leave *should be made in the first instance to the Divisional Court* and that it should be made immediately after the Divisional Court has pronounced its judgment. “There appears, indeed, to be nothing to prevent such application being made later, but it is manifestly the convenient course that the application should be made at the time, for then all the facts are clearly in the minds of the judges” (z).

(r) *Ram Chand v. Shop Mohra Shah* (1929) 11 Lah. L. J. 198, 200, 119 I. C. 427, ('29) A.L. 622. The case seems to have been one under sec. 4; if so, no leave was necessary.

(s) *Ananthanarayana Ayyar v. Sankaranarayana Ayyar* (1924) 47 Mad. 673, 677, 79 I. C. 395, ('24) A.M. 345; *Official Receiver, Cuddapah v. Subbiah* (1927) 50 Mad. 815, 817, 105 I. C. 138, ('27) A.M. 869.

(t) *Radha Mohan v. M. C. White* (1923) 45 All. 364, 365, 73 I. C. 413, ('23) A.A. 466.

(u) *Gopal Ram v. Magni Ram* (1928) 7 Pat. 375, 378, 107 I. C. 380,

('28) A. P. 338.

(v) See *Radha Mohan v. M. C. White* (1925) 45 All. 364, 73 I. C. 413, ('23) A.A. 466.

(w) *Thakur Singh v. Ganga Singh* (1927) 9 Lah. L. J. 257, 259, 103 I. C. 623, ('27) A. L. 424.

(x) *Ananthanarayana Ayyar v. Sankaranarayana Ayyar* (1924) 47 Mad. 673, 677, 79 I. C. 395, ('24) A. M. 345; *Official Receiver, Cuddapah v. Subbiah* (1927) 50 Mad. 815, 817, 105 I. C. 138, ('27) A.M. 869.

(y) B. A., 1883, s. 104; B. A., 1914, s. 108.

(z) *Re Walker* (1884) 1 Morr. 249, 250
Re Maud (1891) 8 Morr. 144, 148.

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In India it has been held that the High Court has concurrent jurisdiction to grant leave. It has therefore power to grant leave though leave has been refused by the District Court (a).

Granting of leave discretionary.—The section does not say in what cases leave to appeal may be granted; it leaves it to the discretion of the Court. Leave, therefore, may be granted even if the appeal does not involve any question of principle or of law and the only question involved in the appeal is one of fact (b). It seems, however, that the Court will in granting leave be guided by the principle underlying sec. 100 (1) of the Code of Civil Procedure, 1908, and grant leave if a question of principle or of law is involved, or the legal conclusions drawn from findings of fact are alleged to be erroneous. Where the only questions involved are questions of fact, leave may be granted if the facts of the case are complicated or the findings are glaringly wrong.

As has already been stated, under the English law where the order is made by a County Court, an appeal lies to a Divisional Court of the High Court, and the decision of the Divisional Court is final unless the Divisional Court or the Court of Appeal gives leave to appeal to the Court of Appeal. In *Ex parte Gilchrist* (c), the Divisional Court refused to grant leave to appeal from its decision. Leave, however, was granted by the Court of Appeal. In the course of his judgment Lord Esher, M.R., said: "The Divisional Court refused an application for leave to appeal from their decision, but leave to appeal was given by this Court. The jurisdiction which the judges of the Divisional Court have to give or to refuse leave to appeal from their own decisions is a very delicate one. Merely to say that they are satisfied their decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case."

Appeal from order granting review.—An appeal is preferred to the District Court from an order of a Subordinate Judge. The District Court does not decide the appeal on the merits, but holds that a regular suit should be filed, and on this ground alone allows the appeal. An application is made for a review of the order and the District Court grants the application and fixes a date for hearing the appeal on the merits. The order granting the application comes within sec. 75 (3), and an appeal lies from it to the High Court with the leave of the District Court or of the High Court. In dealing, however, with such an appeal, the Court should be guided by the principles laid down in O. 47, r. 7, of the Code of Civil Procedure, 1908 (d).

The insolvent has no right of appeal under sec. 68 against any decision or act of the Receiver relating to the administration of his estate, e.g., a sale of his property. If he does appeal, the appeal is incompetent. Where an appeal in such a case was preferred to a District Court, and the Court

(a) *Madhu Sudan Pal v. Parbati Sundari* (1914) 19 C. W. N. 760, 29 I. C. 406; *Official Receiver, Cudappah v. Subbiah* (1927) 50 Mad. 815, 105 I. C. 138, ('27) A. M. 869; *Jugal Kishore v. Ishar Das* (1919) Punj. Rec. No. 63, p. 158, 51 I. C. 695.

(b) *Shibjee Shah v. Hira Lal Rakhal Chand* (1928) 104 I.C., 613 ('28) A.P. 23.

(c) (1886) 17 Q.B.D. 521, 527-528.

(d) *Mannu Lal v. Kunj Bihari Lal* (1922) 44 All. 605, 67 I.C. 317, ('22) A.A. 206.

entertained it and gave leave to the insolvent to appeal to the High Court, it was held that he had no power to grant the leave (e).

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826. Parties to appeal.—The *Receiver* is not a necessary party to an appeal in which the very order of adjudication, as a consequence of which the Receiver was appointed, is in question (f) [see para. 797 above]. Where a creditor's claim to rank as a secured creditor is disallowed, and he appeals from the order joining the Receiver as a party respondent, the other *creditors* are not necessary parties to the appeal as the Receiver represents the whole body of creditors (g). Where property advertised for sale by the Receiver is claimed by a third person but the claim is disallowed, and an appeal is preferred by such person, a purchaser of such property at a sale held by the Receiver and confirmed by the Court after the filing of the appeal, is not a necessary party to the appeal (h). See para. 797 above.

827. Appeal to wrong Court.—Where an appeal which should have been filed in the District Court is filed in the High Court owing to a *bona fide* mistake, the High Court may return the memorandum of appeal to be presented to the District Court, but not if the mistake was not *bona fide*. In the latter case the appeal should be dismissed (i), leaving it to the appellant to file an appeal in the proper Court.

828. Appeal to Privy Council.—An appeal lies to the Privy Council from a final judgment, decree, or order of the High Court passed under the Provincial Insolvency Act. The Privy Council may also grant special leave to appeal (j).

829. Abatement of appeal.—The death of a creditor who is a party to an appeal as representing the whole body of creditors does not cause the appeal to abate (k).

830. Procedure in appeal.—Sec. 5 (2) of the Act provides that the High Courts and District Courts in regard to proceedings under this Act in Courts subordinate to them shall have the same powers and shall follow the same procedure as they respectively have and follow in regard

(e) *Sakhawat Ali v. Radha Mohan* (1919) 41 All. 243, 49 I.C. 816.

(f) *Moti Ram v. Kewal Ram* (1927) 9 Lah. L. J. 550, 105 I.C. 569, ('28) A. L. 202; *Karsandas v. Maganlal* (1902) 26 Bom. 476 [a case under the I. I. A., 1848].

(g) *East India Cigarette Manufacturing Co., Ltd. v. Ananda Mohan Basak* (1919) 24 C.W.N. 401, 58 I.C. 10; *Munshi Ram v. Sheikh Ghulam Dastgir* (1928) 107 I. C. 400, ('28) A. L. 423.

(h) *Jugal Kishore v. Ishar Das* (1919) Punj. Rec. No. 63, p. 156, 51 I.C.

695.

(i) *Chatturbhuj Mahesri v. Harlall Agarwalla* (1925) 80 I. C. 858, ('25) A.C. 335.

(j) *Chatrapat Singh Dugar v. Kharag Singh Lachmiram* (1913) 40 Cal. 685, 19 I. C. 435. See also *Annamalai Chetty v. Official Assignee of Madras* (1925) 35 Mad. L. T. 57, 91 I. C. 126, ('25) A.M. 243 [a case under P.-t. I. A.].

(k) *Thakur Singh v. Ganga Singh* (1927) 9 Lah. L. J. 257, 103 I. C. 623, ('27) A. L. 424.

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to civil suits. Hence if an appeal is filed under this Act to the High Court, the rules of procedure laid down in O. 41 of the Code of Civil Procedure, 1908, will apply to the appeal. A respondent, therefore, in such an appeal is entitled to file a memorandum of cross-objections under O. 41, r. 22, of the Code (*l*).

831. Limitation[sec. 75 (4)].—The periods of limitation for appeals to the District Court and to the High Court are thirty days and ninety days respectively from the date of the order appealed against.

Sec. 78 (1) provides that the provisions of secs. 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals under this Act. Under sec. 5 of the Limitation Act the Court may admit an appeal after the period of limitation prescribed therefor, if the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period. Sec. 12 of the Limitation Act provides that in computing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree appealed from, shall be excluded. For the purpose of sec. 12 of the Limitation Act, a decision under sec. 4 of the Provincial Insolvency Act is to be deemed to be a decree [see sec. 78 (1)]. See paras. 845 and 846 below.

It has been held by the High Court of Allahabad under the rules made by it under O. 43 of the Code of Civil Procedure, 1908, that if an appeal is preferred within the period of limitation prescribed therefor, the fact that the order appealed from is not filed until after the expiration of that period does not take the appeal out of time, provided the order is filed before the hearing (*m*).

In a Calcutta case the Official Receiver made a report on the 12th September 1923 rejecting a creditor's proof. On the 19th September 1923 the District Judge made an order confirming the report. On the 1st October 1923, that is, within twenty-one days from the date of the order of the Official Receiver, the creditor applied under sec. 68 of the Act against the Receiver's order. On the 13th December 1923 the District Judge rejected the application holding that as the report had already been confirmed by him the proper course for the creditor was to appeal under sec. 75 to the High Court. Against that order the creditor appealed to the High Court. The appeal to the High Court was preferred within ninety days from the 13th December 1923. It was argued on behalf of the respondent that the order of the 19th September 1923 must be deemed to be the order appealed from, and as the appeal was filed more than ninety days after the date of that order it was time barred. But this argument was not accepted and it was held that the District Judge had no power to confirm the report of the

(*l*) *Alagappa Chettiar v. Chockalingam Chettiar* (1918) 41 Mad. 904, 84 I. C. 203. (*m*) *Santi Lal v. Raj Narain* (1929) 119 I.C. 4. (29) A.A. 858.

Receiver until after the expiration of twenty-one days from the date thereof [see sec. 68], and that the order appealed from was the order dated 13th December 1923. The appeal, therefore, was not time-barred (n).

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832. Revision [sec. 75 (1), first proviso].—By the first proviso to sec. 75 (1) the High Court has power, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was “according to law,” to call for the case and pass such order with respect thereto as it thinks fit. This proviso is in terms similar to sec. 25 of the Provincial Small Causes Courts Act, 1887. The power given to the High Court by this proviso is very wide. In the exercise of this power the High Court may set aside any order if it is not “according to law” (o). This power is much wider than the power of revision under sec. 115 of the Code of Civil Procedure, 1908. Under that section the High Court has no power to interfere unless the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

The proviso applies only to appellate orders of a District Court. It does not apply to original orders of a District Court, that is, orders specified in sub-secs. (2) and (3) of this section. Further, the proviso applies only to a final order passed by a District Court in appeal. It does not, therefore, apply where an appeal lies to the High Court under the second proviso (p).

Revision under sec. 115 of C. P. C.—By virtue of sec. 5 (2) the High Court has power to revise an order under sec. 115 of the Code made by a District Court in the exercise of its insolvency jurisdiction. The only case, however, in which that section may be availed of is one where leave to appeal has been refused by the High Court under sub-sec. (3). As regards *appellate* orders of a District Court other than those mentioned in the second proviso to sub-sec. (1), no litigant would resort to sec. 115 in preference to the first proviso to sub-sec. (1), the powers of the High Court under that proviso being much larger than those under sec. 115 of the Code. Further, the powers of the High Court under sec. 115 can only be invoked in cases in which no appeal lies to the High Court. There can therefore be no revision under that section of any of the orders referred to in sub-sec. (2), for such orders are appealable to the High Court. Nor can there be any revision of any of the orders specified in sub-sec. (3), unless the High Court has refused leave to appeal from such order (q). This then is the only case in which recourse may be had to

- (n) *Gobinda Chandra Majmudar v. Hari Charan* ('26) A.C. 826, 91 I.C. 332.
(o) *Nagoba v. A. V. Zinzarda* (1929) 121 I.C. 54, ('29) A.N. 338.
(p) See *Kallukutti Parambath Perachan v. Puthen Pettiakkal Kuttiali*

- (1925) 49 Mad. L. J. 595, 91 I.C. 144, ('26) A.M. 123.
(q) See *Chandra Nath Sen v. Nagendra Nath Ganguly* (1928) 107 I.C. 467, ('28) A.C. 263.

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sec. 115. But the chances of the High Court entertaining a revisional application under that section in a case when it has refused leave to appeal are on the face of it almost nil.

833. Review.—Sec. 5(1) of the Act provides that subject to the provisions of the Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. Hence a Court exercising insolvency jurisdiction under the Provincial Insolvency Act, whether it is a Court subordinate to a District Court or a District Court sitting as an appellate Court in insolvency (*r*), has power to review its own orders (*s*). The limits of the power are those prescribed by O. 47, r. 1, of the Code of Civil Procedure, 1908. Under O. 47, r. 1, a person aggrieved by an order may apply for a review of the order on the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the hearing when the order was made, or on the ground of some mistake or error apparent on the face of the record, or for any other sufficient reason. It has been held by the Privy Council in *Chhajju Ram v. Neki* (*t*), that O. 47, r. 1, must be read as in itself definitive of the limits within which review of an order is permitted, and the words “any other sufficient reason” mean a reason sufficient on grounds at least analogous to those specified in the rule.

Though no review may lie from an order under O. 47, r. 1, of the Code, the Court which passed it may rehear the matter if the order was made *ex parte*. In a Calcutta case (*u*), Rankin, C. J., said: “Apart altogether from any statutory provision in the absence of a provision to the contrary, a judicial officer who makes an *ex parte* order imposes a burden on a person who is not present before him, and that when the person affected brings the matter to his notice, it is always open to him to undo the order on the ground that the original order was made on insufficient materials or that for other reason it should not have been made.”

B.—Appeal to Court against Receiver.

834. Appeal to Court against decision of Receiver [Prov. I. A., sec. 68].—If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Receiver, he may apply to the

- (*r*) *Mannu Lal v. Kunj Bihari Lal* (1922) 44 All. 605, 67 I. C. 317, ('22) A. A. 206.
(*s*) *Official Receiver, Tanjore v. Nataraja Sastrial* (1923) 46 Mad. 405, 72 I.C. 225, ('23) A.M. 355; *Abbi-reddi v. Venkatarreddi* (1926) 51

- Mad. L. J. 60, 94 I.C. 351, ('27) A. M. 175.
(*t*) (1922) 49 I. A. 144, 3 Lah. 127, 72 I.C. 566, ('22) A.P.C. 112.
(*u*) *Sarat Kumar Ray v. Nabin Chandra Ram Chandra Shaha* (1929) 56 Cal. 667, 677, 115 I.C. 39, ('28) A.C. 786.

Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks fit.

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This section corresponds to sec. 22 of the Provincial Insolvency Act, 1907. The right given under this section is a right to *apply* to the Court. But though the word used in the section is "apply," a proceeding under this section is more commonly known as an appeal. The marginal note to the section also contains the more familiar word "appeal." See also Bankruptcy Act, 1914, sec. 80.

835. Act or decision of the Receiver.—The acts and decisions of the Receiver referred to in this section would be mainly those mentioned in secs. 56, 59, 61, 62, 63 and 64 of the Act. There is a difference of opinion whether if the Receiver refuses to take a proceeding at the request of a creditor, as for instance, if he refuses to move the Court under sec. 53 or sec. 54, the refusal is an "act" or "decision" within the meaning of this section. The High Court of Allahabad (*v*) has held that it is. The Madras High Court (*w*) has held that it is not, but if after hearing the parties he declares that a transaction impeached by the creditors is valid and refuses to apply to the Court to set it aside, the declaration amounts to a "decision" within the section.

836. Who may apply.—The persons entitled to apply under this section are: (1) the insolvent, (2) any creditor, and (3) any other person aggrieved by an act or decision of the Receiver.

837. The insolvent.—The insolvent is entitled to apply if he is a "person aggrieved." This subject is discussed in para. 818 above.

838. Creditor.—If properties belonging to the insolvent are advertised for sale by the Receiver subject to certain mortgages, and *on the day fixed for the sale* the Receiver announces that they would be sold free of incumbrances, and the properties are sold free of incumbrances, the Court may on the application of a creditor set aside the sale. The sale is injurious to the estate and the creditor is a "person aggrieved," for had the announcement been made earlier there would probably have been more bidders and the properties would have fetched a higher price (*x*). See para. 819 above.

839. Any other person aggrieved.—The question as to who is a "person aggrieved" is discussed in para. 817 above.

A mortgagee who has, before the insolvency of the mortgagor, purchased the mortgaged property in execution of a decree for sale obtained by him

(*v*) *Jhabba Lal v. Shib Charan Das* (1917) 39 All. 152, 37 I. C. 76.

Mad. 673, 679-680, 79 I. C. 395, (24) A. M. 345.

(*w*) *Ananitha Narayana Ayyar v. Sankara Narayana Ayyar* (1924) 47

(*x*) *Tiruvengatachariar v. Thangayiammal* (1916) 39 Mad. 479, 29 I. C. 294.

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against the mortgagor, is not a "person aggrieved" by an advertisement for sale of the same property by the Receiver as property belonging to the insolvent, for if the property was not the property of the insolvent at the date of adjudication, it could not vest in the Receiver, and a sale thereof by the Receiver could not pass any title to the purchaser and cause no prejudice to the mortgagee. But a Receiver being an officer of the Court, the Court has inherent power to review his conduct, and the Court will therefore inquire into the matter and if the mortgagee has acquired a valid title to the property by his purchase the Court will stop the sale (y).

840. Sale by Receiver.—The Receiver is entitled to sell the insolvent's property without the consent of the Court [sec. 59 (a)]. The Court therefore has no power to set aside a sale by the Receiver in the absence of proof of fraud or collusion or material irregularity in conducting the sale or misconduct on his part causing injury to the estate, or unless the Receiver acts beyond his authority or in excess of his powers. A sale by the Receiver is not a "proceeding under this Act" within the meaning of sec. 5, and the provisions of O. 21 of the Code of Civil Procedure, 1908, do not apply to sales by him (z). See para. 690 above.

The insolvent, however, has no *locus standi* to impeach a sale by the Receiver as the whole of his property vests in the Receiver and he has no interest left in the property. A sale by the Receiver as causing injury to the estate can only be impeached by a creditor. See para. 818 above. As to sales by Official Receiver, see para. 769 above.

841. Receiver as a party to an appeal under sec. 68.—The High Court of Allahabad has held that the Receiver should be joined as a party to every proceeding under this section (a). In a Madras case a creditor whose claim was not allowed in full by the Official Receiver applied to the Court under this section. All other creditors were made parties to the application, but not the Official Receiver. The Official Receiver, however, had notice of the application, and he did not appear and resist the application. It was held that the omission to join the Official Receiver as a party was a mere irregularity, and the Court proceeded to deal with the case on the merits (b). It is submitted that even in a case such as the above the Court should order that the Receiver be joined as a party to the proceeding as representing the estate.

- (y) *Hanseshar Ghosh v. Rakhal Das Ghosh* (1913) 18 C. W. N. 366, 20 I. C. 683. See also *Viranna v. Venkatarammayya* (1927) 98 I. C. 1065 ('27) A. M. 232.
(z) *Maung Tha Dun v. Po Ka* (1927) 5 Rang. 768, 107 I. C. 172, ('28) A. R. 60; *Tiruvanakatachariar v. Thangayiammal* (1916) 39 Mad.

- 479, 29 I. C. 294; *Hanseshar Ghosh v. Rakhal Das Ghosh* (1913) 18 C. W. N. 366, 20 I. C. 683.
(a) *Jhabba Lal v. Shib Charan Das* (1917) 39 All. 152, 37 I. C. 76.
(b) *Kumaraswami Nader v. Venkatasami Koundan* (1924) 46 Mad. L. J. 242, 78 I. C. 857, ('24) A. M. 880.

842. Seizure of property of third person by Receiver.—Where property claimed by a third person as his own is seized by the Receiver as belonging to the insolvent [sec. 56], such person may proceed by an application under this section, or he may bring a regular suit to establish his right to the property. This section does not take away the right of such person to proceed by way of suit. But if he elects to apply under this section, and the case is decided, the decision will bar a subsequent suit in respect of the same matter. See para. 65 above.

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843. Limitation for an appeal under sec. 68.—The period of limitation for an application under this section is twenty-one days from the date of the Act or decision complained of. The Court, however, has the power to extend the time under sec. 78 (1) read with sec. 5 of the Indian Limitation Act, 1908. If an application is made within twenty-one days, there is no objection to supplementing it by additional grounds after the expiration of that period (c).

C. — Appeals from orders of Official Receiver.

844. Appeal from orders of Official Receiver [sec. 80].—Certain powers may be delegated to the Official Receiver under sec. 80 of the Act, namely :—

- (1) to frame schedules, and to admit or reject proofs of creditors ;
- (2) to make interim orders in any case of urgency ; and
- (3) to hear and determine any unopposed and *ex parte* application.

Sec. 80 (1), as it originally stood, provided for the delegation of other powers as well, namely, to hear insolvency petitions, to examine the debtor and to make orders of adjudication, to grant orders of discharge, and to approve compositions or schemes of arrangement. These provisions were repealed by sec. 7 of Act 39 of 1926.

Sub-sec. (2) of sec. 80 is in the same terms as sub-sec. (2) of sec. 52 of the Provincial Insolvency Act, 1907. Sub-sec. (2) provides that, " subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court." The words " shall be deemed the

(c) *H. C. Datta v. U. S. Mukhopadhyaya* (1927) 103 I.C. 695, ('27) A. C. 834.

Para. 844 order or act of the Court," are also used in sec. 6 (1) of the Presidency-towns Insolvency Act which provides that an order made or act done by an officer empowered under that section "shall be deemed the order or act of the Court." The word "Court" is defined in the Presidency-towns Insolvency Act as "the Court exercising jurisdiction under this Act." There was a similar definition of the word "Court" in sec. 2 (1) (g) of the Provincial Insolvency Act, 1907, but that definition has been omitted in the present Act. If the words "subject to the appeal to the Court provided for by section 68" had not occurred in sec. 80 (2), the Official Receiver would have been "the Court" under the present Act as to orders made by him in the exercise of the powers specified in sec. 80 (1). If so, the Official Receiver would be a Court subordinate to a District Court, and an appeal would lie from his orders to the District Court, and the decision of the District Court in appeal would be final under sec. 75 (1). But the words "subject to the appeal to the Court provided for by section 68" do occur in the section. It has accordingly been held in cases under the Provincial Insolvency Act, 1907, that the Official Receiver is not "the Court." Therefore, a person aggrieved by an order made by the Official Receiver has to apply in the first instance under sec. 68 to the Court in which the insolvency proceedings are pending, and if that Court is a District Court, an appeal lies from the order of the District Court to the High Court under sec. 75 (2) or sec. 75 (3), the order of the District Court not being an order made in appeal from an order of a subordinate Court. It was also held in the same cases that the word "appeal" in sec. 80 (2) was a mistake for "application." The result of the decisions is that the Official Receiver is not a Court subordinate to the District Court within sec. 75 (1) of the Act, and that he is in the same position as an ordinary receiver even as to orders made by him in the exercise of the powers delegated to him under sec. 80 (1) of the Act (*d*). If this be the correct view, as it seems to be, the whole of sub-sec. (2) becomes superfluous. This was pointed out in one of the two cases cited above (*e*), but the Legislature seems to have overlooked it. There are two courses open to the Legislature—either to omit the sub-section altogether in which case sec. 68 will operate or to omit the words "subject to the appeal to the Court provided for by sec. 68," and to provide for an appeal from the order of the Official Receiver to the District Court subject to the same provisions as those contained in sec. 75 (1).

(*d*) *Alla v. Kuppai* (1917) 40 Mad. 752, 39 I. C. 429; *Chidambaram Chetty v. Nagappa Chetty* (1915)

38 Mad. 15, 16 I.C. 820.
(*e*) *Alla v. Kuppai* (1917) 40 Mad. 752, at p. 757, 39 I.C. 429.

7. Limitation under Provincial Insolvency Act.

845. Limitation [Prov. I. A., s. 78].—The provisions of secs. 5 and 12 of the Indian Limitation Act, 1908, apply to appeals and applications under the Provincial Insolvency Act. Paras.
845, 846

Where an order of adjudication has been annulled under the Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree [other than a suit or application in respect of which the leave of the Court was obtained under sec. 28 (2)] which might have been brought or made but for the making of an order of adjudication under the Act, the period from the date of the order of adjudication to the date of the order of annulment is to be excluded: provided that nothing herein contained shall apply to a suit or application in respect of a debt provable but not proved under the Act.

846. Limitation as to appeals and applications.—The preceding paragraph is in substance a reproduction of sec. 78 of the Provincial Insolvency Act, 1920. Before the enactment of that section there was a conflict of decisions as to whether the Courts had power to admit appeals and applications under the Provincial Insolvency Act, 1907, after the expiration of the period of limitation prescribed by that Act, if sufficient cause was shown for such admission. There was also a conflict of decisions as to whether the Insolvency Court had power under that Act to exclude the time requisite for obtaining a copy of a judgment. It was held in a large majority of cases that the Act of 1907 was a self-contained Act and that the general provisions of the Indian Limitation Act, 1908, could not be introduced into the Act. It was accordingly held that sec. 5 of the Indian Limitation Act, 1908, which provides for the admission of appeals and applications after the period of limitation prescribed therefor and sec. 12 of the same Act which provides for the exclusion of time requisite for obtaining a copy of a judgment did not apply to appeals and applications under that Act (*f*). On the other hand it was held in some cases that the Act of 1907 was not in itself a complete code and that the general provisions of the Indian Limitation Act applied to the Act of 1907 (*g*). To put an end to this conflict it was provided by sec. 78 of the Provincial Insolvency Act, 1920, that the provisions of secs. 5 and 12 of the Indian Limitation Act should apply to appeals and applications under the Act of 1920. The section (sec. 78) does not apply to an application which had become barred while the Act of 1907 was in force (*h*). The mere fact, however, that an appeal or application may arise out of insolvency proceedings commenced while

(*f*) *Lingayya v. Chinna Narayana* (1918) 41 Mad. 189, 44 I. C. 805; *Thakur Prasad v. Panno Lal* (1913) 35 All. 410, 20 I. C. 673; *Sivaramayya v. Bhujanga Rao* (1916) 39 Mad. 593, 30 I. C. 703; *Ramaswami Pillai v. Venkateswara Aiyar* (1919) 42

Mad. 13, 48 I. C. 952.

(*g*) *Dropadi v. Hira Lal* (1912) 34 All. 496, 16 I. C. 149.

(*h*) *Aiyapparaju v. Venkatakrishnayya* (1923) 44 Mad. L. J. 303, 72 I. C. 488, ('23) A. M. 462.

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846, 847**

the Act of 1907 was in force is no bar to the application of this section (i). The section applies only to applications and appeals. It does not apply to insolvency petitions which are governed by sec. 9 (2) of the Act. That section provides that a creditor's petition must be presented *within three months* after the commission of the act of insolvency, and the Court has no power to admit it if it is not presented within that period (j).

The Bankruptcy Act, 1883, contained a provision empowering the Court to extend the time for doing any act or thing prescribed by that Act (k). That provision has been reproduced in the Bankruptcy Act, 1914, sec. 109 (4). A similar provision occurs in the Presidency-towns Insolvency Act, sec. 90 (5).

847. Limitation as to suits.—Where an order of adjudication is annulled, and a suit is instituted by a creditor after annulment, and the suit is barred at the date of institution, the question arises whether the period from the date of the order of adjudication to the date of the order of annulment can be excluded in computing the period of limitation prescribed for the suit. The Provincial Insolvency Act, 1907, did not contain any section providing for such a case nor is there any provision to that effect in the Indian Limitation Act, 1908. It was contended in some cases both under the Presidency-towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1907, that sec. 15 of the Indian Limitation Act, 1908, which provides for the exclusion of time where a suit has been stayed by injunction or by an order of the Court, applied to such a case, the ground of the contention being that after adjudication no suit to recover a debt provable in insolvency could be brought without the leave of the Insolvency Court and that such prohibition operated as a stay within the meaning of sec. 15 of the Indian Limitation Act. The obvious answer to that argument was that the fact that a suit could not be brought without the leave of the Court did not create an absolute bar to the institution of the suit, and it was accordingly held that sec. 15 of the Indian Limitation Act did not apply. The result was that there being no provision in the Act of 1907 nor in the Indian Limitation Act providing for such cases, the general rule applied, namely, that if the period of limitation once begins to run it continues to run whatever happens (l). “The principle of the rule—if on such a technical matter there can be said to be any principle—appears to be that if any man has a cause of action which is ripe so that he has an opportunity of bringing his action and does not do so, he thereby takes the risk of some unexpected event happening which takes away from him the possibility of bringing his

- (i) *Karuthan Chettiar v. Raman Chetti* (1923) 45 Mad. L. J. 844, 80 I. C. 376, ('24) A. M. 400.
(j) *Bulomal v. Sumar Khan* (1928) 112 I. C. 646, ('28) A. S. 177; *Aiyappara v. Venkata Krishnayya* (1923) 44 Mad. L. J. 303, 306, 72 I. C. 488, ('23) A. M. 462.

- (k) B. A., 1883, s. 105 (4).
(l) *Ramaswami Pillai v. Govindasami Naicker* (1919) 42 Mad. 319, 49 I. C. 625 [a case under Prov. I. A.]; *Sidhraj Bhojraj v. Ali Haji* (1923) 47 Bom. 244, 67 I. C. 57, ('23) A. B. 33 [a case under P.-t. I. A.]

action within the remainder of the period which he has under the statute. The rule may work hardship in particular cases, but it is so well established that no Court would now decline to follow it" (m). The same difficulty arose as regards applications for execution of decrees. To remove this hardship the legislature intervened and by sec. 78 of the Provincial Insolvency Act, 1920, it is now provided that where an order of adjudication has been annulled under that Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree, the period from the date of the order of adjudication to the date of the order of annulment is to be excluded.

Para. 847

The suit contemplated by this section is a suit not barred at the date of adjudication. The section does not apply to suits barred at the date of adjudication (n), nor does it apply unless the adjudication has been annulled. If a suit is instituted *during the pendency of the insolvency proceedings*, and it is barred at the date of institution, the period from the date of the order of adjudication to the date of the institution cannot be excluded. The period to be excluded is from the date of the order of adjudication to the date of the order of annulment, and there being no annulment, the section does not apply. "So long as the insolvency proceedings are pending the period of limitation is suspended, provided the claim was not barred on the day of adjudication, and if the order of adjudication is annulled the right to proceed against the insolvent would revive and the period during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property" (o).

The section does not apply where a creditor has before annulment obtained leave to sue or to execute his decree, the reason being that where leave is granted there is no impediment in the way of a suit or execution. The leave to sue or to execute must be unconditional. If leave is granted subject to the condition that the creditor should deposit the proceeds of sale in execution with the Receiver, it is no "leave" within the meaning of this section, and if no suit is filed or execution proceedings instituted on such leave, the creditor is entitled to the benefit of this section and the period specified in the section will be excluded in computing the period of limitation for any suit or proceeding in execution which he may institute (p).

The section does not apply to a suit in respect of a debt provable but not proved under the Act. It has been held that a debt admitted by the insolvent in his schedule is a debt proved within the meaning of this section, even if it be not proved in the mode prescribed by sec. 49 of the Act, and the creditor is entitled to the deduction of time mentioned in

(m) *Re Benzon* (1914) 2 Ch. 68, 76.

(n) See *Re Benzon* (1914) 2 Ch. 68.

(o) *Machanjeeri Ahmed v. Govinda Prabhu* (1928) 51 Mad. 862, ('28)

A. M. 977.

(p) *Mul Chand v. Rajdhar* (1925) 23 All. L. J. 975, 88 I. C. 544, ('25) A. A. 735.

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this section (g). The same has been held of a debt in respect of which a decree has been passed against the insolvent and the Receiver, and in the Receiver's presence (r). These decisions ignore the words "under the Act" which occur at the end of the proviso to the section.

It has been held by the Chief Court of Oudh that the section does not apply to secured creditors, the ground of the decision being that a secured creditor may, notwithstanding the insolvency of the mortgagor, commence a suit or execution without the leave of the Court, and that if he does not, he must take the consequence, and the period mentioned in this section cannot be excluded (s).

Acknowledgment of debt in petition or schedule.—See para. 257.

Proof of debt and limitation.—See para. 328.

8. Costs.

848. Costs [P.-t. I. A., s. 90 (2) ; Prov. I. A., s. 76].—The costs of and incidental to any proceeding are, subject to any rules made under the Acts, in the discretion of the Court in which the proceeding is had.

849. Costs of Official Assignee or Receiver.—The following rules relating to the costs of the Official Assignee and of the Receiver are well established and require special notice :

(1) Where an Official Assignee or a Receiver brings or defends a suit he is as between himself and the other parties to the suit like any other litigant. He may therefore be made personally liable for the costs of a suit or an application to which he is a party, subject to the *Insolvency Court* allowing him to recoup himself out of the estate if his conduct has been *bona fide* (t). Such being the case, the Official Assignee or Receiver should, where the estate is small, before embarking on litigation as plaintiff or defendant or making an application, obtain from the creditors for his own protection an indemnity against the costs (u). Where, however, the Official Assignee is discharging a statutory duty imposed upon him by the Act, there is no power to order him to pay the costs (v).

- (g) *Krishna Chandra Das v. Jotindra Nath Porial* (1928) 48 Cal. L.J. 574, 114 I. C. 415, ('29) A.C. 159.
- (r) *Ramalinga Ayyar v. Rayalu Ayyar* (1930) 53 Mad. 243, 122 I. C. 341, ('30) A.M. 356.
- (s) *Thakuran Sri Ram v. Babu Ram* (1929) 4 Luck. 241, 113 I. C. 86, ('29) A.O. 71.
- (t) *Ex parte Angerstein* (1874) L.R. 9 Ch. App. 479. [application]; *Pitts v. La Fontain* (1880) 6 App. Cas. 482 [plaintiff]; *Balakrishna Menon v. Manakkal Uma* (1929) 52 Mad. 263, 114 I. C. 825, ('29)

- A.M. 105 [plaintiff]; *James Bevis v. C. A. Turner* (1883) 7 Bom. 484 [defendant]; *Bai Kashi v. Chunilal* (1929) 31 Bom. L. R. 1199, 122 I. C. 857, ('30) A. B. 11 [defendant]; *Watson v. Holliday* (1882) 20 Ch. D. 780; *Re Mackenzie* (1899) 2 Q.B. 566; *Re Bryant* (1889) 6 Morr. 262.
- (u) *Ex parte Angerstein* (1874) L.R. 9 Ch. App. 479.
- (v) *Re John Tweedle & Co., Ltd.* (1910) 2 K. B. 697.

Where a decree in a suit or appeal directs the Official Assignee or Receiver to pay the costs, without stating that the costs should be paid out of the insolvent's estate, the decree may be executed against him personally. It is, however, open to him to apply to the Insolvency Court for an order that he may reimburse himself out of the estate (*w*).

(2) Where a *plaintiff* becomes insolvent pending his suit, and the Official Assignee or Receiver elects to continue the suit and becomes a party, he adopts the whole suit as from the commencement, and may be made personally liable for the whole of the costs if he is unsuccessful (*x*).

(3) Where a *defendant* becomes insolvent pending the suit, and the Official Assignee or the Receiver is brought on the record as a defendant, he may elect to contest the plaintiff's claim or allow judgment to go against him. If he elects to defend, but the defence fails, he may be made personally liable for the whole costs of the defence (*y*). But if he is made a party solely for the convenience of other parties and submits himself to the orders of the Court he will ordinarily not be required to pay any costs to any opposite party (*z*).

(4) If the Official Assignee or the Receiver brings an unsuccessful motion, however careful he may have been, the Court will generally order him to pay the respondent's costs. If the motion is brought with the leave of the Court, he will have the right of indemnity given him by that order. The order for costs should not be directed to be limited to the assets in the hands of the Official Assignee or the Receiver. If the assets in his hands are insufficient to pay all the costs, he must bear them personally. In such a case he should have protected himself by obtaining an indemnity from the parties in whose interest the motion was brought before he started proceedings (*a*). The same rules apply where the Official Assignee or the Receiver unsuccessfully resists an application (*b*).

(5) Where an appeal is preferred by the insolvent against an order of adjudication, the Court may, besides awarding costs to the respondents

- (*w*) *Balakrishna Menon v. Manakkal Uma* (1929) 52 Mad. 263, 114 I. C. 825, ('29) A. M. 105.
- (*x*) See *Watson v. Holliday* (1882) 20 Ch.D. 780, at p. 785; *Abdul Rahiman v. Shaw Wallace & Co.* (1925) 92 I. C. 620, ('25) A. M. 736.
- (*y*) *Watson v. Holliday* (1882) 20 Ch.D. 780; *Borneman v. Wilson* (1885) 28 Ch.D. 53; *School Board For London v. Wall Brothers* (1891) 8 Morr. 202.
- (*z*) See *Dansk Rekliriffel Syndikat v. Snell* (1908) 2 Ch. 127, at p. 138.
- (*a*) *Ex parte Angerstein* (1874) L.R. 9 Ch.App. 479; *Re Suresh Chander Gooyee* (1918) 23 C.W.N. 431,

- 51 I.C. 654; *Re W. H. Wilkinson* (1884) 1 Morr. 65; *Re Glanville* (1885) 2 Morr. 71; *Re Arthur Williams & Co.* (1913) 2 K.B. 88; *Re Mackenzie* (1899) 2 Q.B. 556; *Re Bryant* (1889) 6 Morr. 262.
- (*b*) *Re John Tweddle and Company Limited* (1910) K.B. 697; *Re Galey* (1890) 7 Morr. 253; *Re Bryant* (1889) 6 Morr. 262; *Re Abdul Rahiman Sahib & Co.* (1928) 51 Mad. 308, 112 I.C. 486, ('28) A.M. 890; *Official Assignee of Calcutta v. Ramratan Das Bagree* (1927) 54 Cal. 317, 327-328, 102 I.C. 539, ('27) A.C. 539.

**Paras.
849-853**

(petitioning creditors), award to the Official Assignee or the Receiver the costs which he has incurred in appearing in the appeal and supporting the creditors (c).

(6) Where a person who was adjudicated insolvent by the High Court of Calcutta applied to set aside the order of adjudication, and, the application was allowed with costs, it was held that a suit would lie to recover such costs (d).

850. Insolvency Rules as to costs of Official Assignee.—For Rules as to costs of the Official Assignee, see Calcutta Rule 47 (3), Madras Rule 132, Bombay Rules 182-183 (a), and Rangoon Rule 74.

851. Costs in other matters.—Costs in other matters are provided for by Rules. For Rules under the Presidency-towns Insolvency Act, see Calcutta Rules 47-49, Madras Rules 132-137, Bombay Rules 182-183A, and Rangoon Rules 71-77. For Rules under the Provincial Insolvency Act, see Calcutta Rules 31-32; Bombay Rule XXVII; Allahabad Rules 35-37.

9. Rules.

852. Power to make Rules.—It has been stated more than once in the preceding pages that certain notices are to be given and certain proceedings are to be taken “in manner prescribed.” The term “prescribed” has been defined in each of the two Acts as meaning “prescribed by Rules made under this Act.” Power has been given under both the Acts to the High Courts to make Rules for carrying into effect the object of the Acts. The Rules and the forms prescribed by the Rules must be strictly followed (e).

853. Rules under Presidency-towns Insolvency Act (s. 112).—The Courts having jurisdiction under this Act may from time to time make Rules for carrying into effect the objects of the Presidency-towns Insolvency Act. In particular and without prejudice to the generality of the foregoing power, such Rules may provide for and regulate—

- (a) the fees and percentages to be charged under this Act and the manner in which the same are to be collected and accounted for and the account to which they are to be paid;
- (b) the investment, whether separately or collectively, of unclaimed dividends, balances and other sums appertaining to the estates of insolvent debtors, whether adjudicated insolvent under this or any former enactment; and the application of the proceeds of such investment;

(c) *In the matter of Haroon Mahomed* (1890) 14 Bom. 189.

(d) *Annoda Prasad Banerjee v. Nobo Kishore Roy* (1906) 33 Cal. 560.

(e) *Krishna Chinoo and Sons v. Matu-*

bhai (1929) 53 Bom. 290, 296, 299, 117 I.C. 440, ('29) A.B. 107; *Venkatanarayana Chetty v. Sevugan Chetty* (1924) 47 Mad. 916, 80 I.C. 620, ('24) A.M. 769.

- (c) the proceedings of the official assignee in taking possession of and realizing the estates of insolvent debtors ;
- (d) the remuneration of the official assignee ;
- (e) the receipts, payments and accounts of the official assignee ;
- (f) the audit of the accounts of the official assignee ;
- (g) the payment of the remuneration of the official assignee, of the costs, charges and expenses of his establishment, and of the costs of the audit of his accounts out of the proceeds of the investments in his hands ;
- (h) the payment of the costs incurred in the prosecution of fraudulent debtors and in legal proceedings taken by the official assignee under the direction of the Court out of the proceeds aforesaid ;
- (i) the payment of any civil liability incurred by an official assignee acting under the order or direction of the Court ;
- (j) the proceedings to be taken in connection with proposals for composition and schemes of arrangement with the creditors of insolvent debtors ;
- (k) the intervention of the official assignee at the hearing of applications and matters relating to insolvent debtors and their estates ;
- (kk) filing of lists of creditors and debtors and the affording of assistance to the Court by a petitioning debtor ;
- (l) the examination by the official assignee of the books and papers of account of undischarged insolvent debtors ;
- (m) the service of notices in proceedings under this Act ;
- (n) the appointment, meetings and procedure of committees of inspection ;
- (o) the conduct of proceedings under this Act in the name of a firm ;
- (p) the forms to be used in proceedings under this Act ;
- (q) the procedure to be followed in the case of estates to be administered in a summary manner ;
- (r) the procedure to be followed in the case of estates of deceased persons to be administered under this Act.
- (s) the distribution of work between the Official Assignee and his deputy or deputies.

854. Sanction to Rules under Presidency-towns Insolvency Act (s. 113).—Rules made under sec. 112 are subject, in the case of the High Court of Judicature at Fort William in Bengal, to the previous sanction of the Governor General in Council and, in the case of any other Court, of the Local Government.

**Paras.
855-858**

855. Publications of Rules under Presidency-towns Insolvency Act (s. 114).—Rules so made and sanctioned are required to be published in the Gazette of India or in the local official Gazette, as the case may be, and they have thereupon the same force and effect with regard to proceedings under the Act in the Court which made them as if they had been enacted in the Act.

856. Rules under Provincial Insolvency Act (s. 79).—The High Court may, with the previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor General in Council, and, in the case of any other High Court, of the Local Government, make rules for carrying into effect the provisions of the Provincial Insolvency Act. In particular and without prejudice to the generality of the foregoing power, such rules may provide—

- (a) for the appointment, and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers and the costs of such audit,
- (b) for meetings of creditors,
- (c) for the procedure to be followed where the debtor is a firm,
- (d) for the procedure to be followed in the case of estates to be administered in a summary manner, and
- (e) for any matter which is to be or may be prescribed.

All Rules made under this section are required to be published in the Gazette of India or in the local official Gazette, as the case may be, and will on such publication have effect as if enacted in the Act.

10. Miscellaneous—Presidency-towns Insolvency Act.

857. Warrants for Insolvency Courts [P.-t. I. A., s. 100].—A warrant of arrest issued by the Court may be executed in the same manner and subject to the same conditions as a warrant of arrest issued under the Code of Criminal Procedure, 1898, may be executed. A warrant to seize any part of the property of an insolvent, issued by the Court under section 59, sub-section (1), shall be in the form prescribed, and secs. 77 (2), 79, 82, 83, 84 and 102 of that Code will so far as may be, apply to the execution of such warrant. A search-warrant issued by the Court under sec. 59 (2) may be executed in the same manner and subject to the same conditions as a search-warrant for property supposed to be stolen may be executed under that Code.

858. Exemption from duty of transfers, etc. [P.-t. I. A., s. 115].—Every transfer, mortgage, assignment, power-of-attorney, proxy paper, certificate, affidavit, bond or other proceedings, instrument or writing whatsoever before or under any order of the Court, and any copy thereof

is exempt from payment of any stamp or other duty whatsoever. No stamp duty or fee is chargeable for any application made by the Official Assignee to the Court under the Act, or for the drawing and issuing of any order made by the Court on such application.

Attorney representing Official Assignee.—An attorney representing the Official Assignee is entitled to the same privileges as to stamp duty as the latter has under this section (f).

859. The Gazette to be evidence [P.-t. I. A., s. 116].—A copy of the official Gazette containing any notice inserted in pursuance of the Act is evidence of the facts stated in the notice. A copy of the official Gazette containing any notice of an order of adjudication is conclusive evidence of the order having been duly made, and of its date.

Copy of Gazette as conclusive evidence.—A copy of the official Gazette containing any notice of an order of adjudication is conclusive evidence that the order was *duly made*, and of its date, while a copy of such Gazette containing any notice inserted in pursuance of the Act is evidence of the facts stated in the notice. The point to be noted is that while in the first case the copy is conclusive evidence, in the second it is merely evidence (g).

860. Swearing of affidavits [P.-t. I. A., s. 117].—Any affidavit may be used in a Court having jurisdiction under this Act if it is sworn—

- (a) in British India, before—
 - (i) any Court or Magistrate, or
 - (ii) any officer or other person appointed to administer oaths under the Code of Civil Procedure, 1908 ;
- (b) in England, before any person authorized to administer oaths in His Majesty's High Court of Justice, or in the Court of Chancery of the County Palatine of Lancaster, or before any Registrar of a Bankruptcy Court, or before any officer of a Bankruptcy Court authorized in writing in that behalf by the Judge of the Court or before a Justice of the Peace for the county or place where it is sworn ;
- (c) in Scotland or in Ireland, before a Judge Ordinary, Magistrate or Justice of the Peace ; and,
- (d) in any other place, before a Magistrate or Justice of the Peace or other person qualified to administer oaths in that place (he being certified to be a Magistrate or Justice of the Peace, or qualified as aforesaid, by a British Minister or British Consul or British Political Agent or by a notary public).

(f) *Official Assignee of Madras v. Ramaswamy Chetty* (1920) 43 Mad. 747, 59 I.C. 475.

(g) *Official Assignee of Madras v.*

O. R. M. O. R. S. Firm (1927) 50 Mad. 541, 101 I.C. 12, ('27) A.M. 526.

**Paras.
861-863**

861. Formal defect not to invalidate proceedings [P.-t. I. A., s. 118].—No. proceeding in insolvency is invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

No defect or irregularity in the appointment of an Official Assignee or member of a committee of inspection vitiates any act done by him in good faith.

Irregularity.—Failure to serve a creditor's petition where the hearing of the petition is adjourned, as required by the Presidency-towns Insolvency Act, sec. 13 (3), is not a mere irregularity. If the petition is not served, and an order of adjudication is made, the order must be set aside (h). An order under sec. 36 (4) and sec. 36 (5) of that Act can only be made on the application of the Official Assignee. If such an order is made on the application of a creditor, it is one without jurisdiction. This is not a case of irregularity within the meaning of the section and the order must be set aside (i). See also the cases cited in paras. 155 and 158 above. As to "formal defect," see para. 376 above.

862. Certain provisions to bind the Crown [P.-t. I. A., s. 120].—Save as herein provided, the provisions of the Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge bind the Crown.

Rights of the Crown.—As to the rights of the Crown in general, see *New South Wales Taxation Commissioners v. Palmer* (j), *Food Controller v. Cork* (k), *Secretary of State for India v. Bombay Landing & Shipping Co.* (l), and *Judah v. Secretary of State for India* (m).

863. Rights of audience [P.-t. I. A., s. 121].—Nothing in the Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of the Act, or shall be deemed to confer such right in

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| <p>(h) <i>Nathmull v. Goneshmull Jivanmull</i> (1921) 34 Cal. L. J. 349, 66 I.C. 886 (21) A. C. 106.</p> <p>(i) <i>Sitaram Khemka v. Haribuz Fatehpuria</i> (1926) 30 C. W. N.</p> | <p>(j) 914, 98 I.C. 723, ('26) A.C. 1097</p> <p>(k) (1907) A. C. 179.</p> <p>(l) (1923) A. C. 647.</p> <p>(m) (1868) 5 Bom. H. C. O. C. 23.</p> <p>(n) (1886) 12 Cal. 445.</p> |
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insolvency matters on any person who had not a right of audience before the Courts for the Relief of Insolvent Debtors.

**Paras.
863, 864**

Rights of audience.—By sec. 3 of the Indian Insolvency Act, 1848, it was provided that every advocate and attorney of the supreme Courts at Calcutta, Madras and Bombay respectively should be entitled to practise in the way of his profession in the Courts for the Relief of Insolvent Debtors of that presidency, and no other persons should practise as advocates or attorneys in those Courts. It has been held in Madras that Vakils have no right of audience in the Insolvency Court in the Presidency-town of Madras (*n*). In Bombay it was held so far back as 1913 that attorneys of the High Court had a right of audience before the officer appointed under sec. 6 of the Presidency-towns Insolvency Act (*o*).

864. Fees and percentages [P.-t. I. A., s. 125].—Such fees and percentages must be charged for and in respect of proceedings under the Act as may be prescribed.

(*n*). *Krishnaswami Ayyar v. Swaminatha Ayyar* (1925) 48 Mad. 331, 85 I.C. 1025, ('25) A.M. 385.

(*o*) *Re Advocate General of Bombay* (1913) 37 Bom. 464, 19 I.C. 421. See Bombay Rules, Rule 40.

**PROVINCIAL INSOLVENCY
ACT, 1920.**

COMPARATIVE TABLE.—Prov. I. A.

Prov. I. A., 1920.	Prov. I. A., 1907.	P-t. I. A., 1909.	Prov. I. A., 1920.	Prov. I. A., 1907.	P-t. I. A., 1909.
2	2	2	19	12	
3	3		20	13 (2)	16
4 [New]		7	21	13	
5	47	90 (1)	22	43 (1)	33 (1), (2)
6	4	9	23 [New]		
7	5	10	24	14	cf. 13 (2), 90 (3)
8	6 (6)	107	25	15 (1)	13 (4)
9	6 (4), (5)	12	26	15 (2), (3)	
10	6 (3)	14	27	16 (1)	cf. 13 (5), 15 (1)
11	6 (2)	11	28	16	33 (3), 17, 52 (2) (c), 52 (2) (a), 52 (1), 17 (proviso), 51.
12	6 (1)	13 (1)	29 [New]		18 (3)
13	11 (1)	15 (1)	30	16 (7)	20
14	7	13 (8), 15 (2)	31 [New]		25
15	8	91	32 [New]		21
16	9	92	33	24	Sch. 11, r. 1 ; 46 (4) proviso.
17	10	93	34	28 (2)	46 (1), (3)
18	6 (1)		35	42 (1)	21

Comparative Table—*contd.*

Prov. I. A., 1920.	Prov. I. A., 1907.	P-t. I. A., 1909.	Prov. I. A., 1920.	Prov. I. A., 1907.	P-t. I. A., 1909.
36	17	22	54	37	56
37	42 (2), (3)	23	54 A [New]		
38	27	28 (1)-(3), 29 (4)-(7)	55	38	57
39	27 (7)	30	56	18	77
40	27 (8)	31	57	19	81
41	44 (1), (2)	38 (1), 40	58	23	
42	44 (3) to (5)	39	59	20	68
43 [New]		41	59A [New]		36
44	45	45	60	21	
45	29	Sch. II, r. 24	61	33	49
46	30	47	62	39 (1), (2)	71
47	31	Sch. II, r. 9, r. 11, r. 15	63	39 (3)	72
48	32	Sch. II, r. 23	64	39 (4)	73
49	25	Sch. II, r. 2.	65	39 (5)	74
50	26	Sch. II, r. 20, Sch. II, r. 27.	66	40	75
51	34	53	67	41	76
52	35	54	67 A [New]		88
53	36	55	68	22	86

Comparative Table—concl'd.

Prov. I. A., 1920.	Prov. I. A., 1907.	P-t. I. A., 1909.	Prov. I. A., 1920.	Prov. I. A., 1907.	P-t. I. A., 1909.
69	43 (2)	103	77	50	126
70 [New]		104	78 [New]		
71 [New]		105	79	51	112, 113
72	53	102	80	52	<i>cf.</i> 6
73 [New]		103A	81	54	
74	48	106	82	55	
75	46	8 (2) (b)	83	56	
76	49	90 (2)			

PROVINCIAL INSOLVENCY ACT.

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THE PROVINCIAL INSOLVENCY ACT, 1920.

(V of 1920)

[PASSED BY THE INDIAN LEGISLATIVE COUNCIL.]

(Received the assent of the Governor General on the 25th February 1920.)

An Act to consolidate and amend the Law relating to Insolvency in British India as administered by Courts having jurisdiction outside the Presidency-towns and the Town of Rangoon. **Prov. I. A.**
ss. 1, 2

Whereas it is expedient to consolidate and amend the law relating to insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the ¹ [Towns of Rangoon and Karachi]; It is hereby enacted as follows :—

Short title and extent. 1. (1) This Act may be called the Provincial Insolvency Act, 1920.

(2) It extends to the whole of British India, except the Scheduled Districts.²

Definitions. 2. (1) In this Act, unless there is anything repugnant in the subject or context,—

- (a) “ creditor ” includes a decree-holder, “ debt ” includes a judgment-debt, and “ debtor ” includes a judgment-debtor ;
- (b) “ District Court ” means the principal Civil Court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns ¹ [the Town of Rangoon and the limits of the ordinary original civil jurisdiction of the ² Court of the Judicial Commissioner of Sind as defined in section 2 of the Presidency-towns Insolvency Act, 1909] ;

¹ These words were substituted by s. 11 of the Insolvency (Amendment) Act, 1926 (IX of 1926).

² This Act has been extended by notification under s. 5 of the Scheduled Districts Act, 1874 (XIV of 1874) to—

The Province of Sind—See Gazette of India, 1920, pt. I, p. 2052, and Bombay Government Gazette, 1920, pt. I, p. 2765.

Coorg—See Gazette of India, 1920, pt. II, p. 1333.

Upper Burma—See Burma Gazette, 1920, pt. I, p. 1303.

Districts of Cachar (excluding the North Cachar Hills), Sylhet, Goalpara, Kamrup, Darrang, Nowgong (excluding the Nowgong Mikir Hills Tract), Sibsagar (excluding the Sibsagar Mikir Hills Tract) and Lakshmipur (excluding the Lakshmipur Frontier Tract)—See Assam Gazette, 1920, pt. II, p. 2511.

District of Darjeeling—See Calcutta Gazette, 1921, pt. I, p. 288.

British Baluchistan—See Baluchistan Local Rules and Orders, pt. II, p. 244.

This Act has been declared in force in the Pargana of Manpur, see s. 2, and Schedule of the Manpur Laws Regulation, 1926, in Panth Piploda, Regulation 1 of 1929, s. 2.

This Act was extended to all the Scheduled Districts in the N. W. F. Province—See Notification No. 2286-G dated 20th May 1920, Gazette of India, 1920, pt. II, p. 910.

³ The words “ Chief Court of Sind ” are to be read for the words “ Court of the Judicial Commissioner of Sind ”, when the Sind Courts (Supplementary) Act, 1926 (XXXIV of 1926) is brought into force.

Prov. I. A.
ss. 2-4

- (c) "prescribed" means prescribed by rules made under this Act;
- (d) "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;
- (e) "secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor; and
- (f) "transfer of property" includes a transfer of any interest in property and the creation of any charge upon property.

(2) Words and expressions used in this Act and defined in the Code of Civil Procedure, 1908, not hereinbefore defined shall have the same meanings as those respectively attributed to them by the said Code.

Parallel enactments.—Prov. I. A., 1907, s. 2.

Sub-sec. (1) (a): "Debt."—Pp. 117-118, paras. 151-153.

Debtor.—P. 62, para. 83.

Sub-sec. (1) (d): "Property."—P. 373, para. 542.

Sub-sec. (1) (e): Secured creditor.—P. 182, para. 258.

PART I.

CONSTITUTION AND POWERS OF COURT.

3. (1) The District Courts shall be the Court having jurisdiction under this Act:—

Insolvency jurisdiction. Provided that the Local Government may, by notification in the local official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.

(2) For the purposes of this Act, a Court of Small Causes shall be deemed to be subordinate to the District Court.

Parallel enactments.—Prov. I. A., 1907, s. 3.

District Courts.—P. 32, para. 53.

Additional District Judge.—P. 32, para. 54.

Concurrent jurisdiction.—P. 32, para. 32.

Restriction on powers of certain Courts.—P. 33, para. 56.

4. (1) Subject to the provision of this Act, the Court shall have full power to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court, or which the Court

Power of Court to decide all questions arising in insolvency.

may deem it expedient or necessary to decide for the purpose of doing **Prov. I. A.** complete justice or making a complete distribution of property in any **ss. 4, 5** such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

Parallel enactments.—This section is new. See P.-t. I. A., s. 7.

Sub-sec. (1).

Jurisdiction to decide questions arising in insolvency.—P. 33.

Corresponding sections of Bankruptcy Acts.—Pp. 33-34.

Superior title of trustee in bankruptcy in certain cases.—P. 34, para. 58.

Exercise of jurisdiction under English law discretionary.—Pp. 36-38, para. 59.

Transfers within sec. 53 of the Transfer of Property Act, 1882.—P. 48, para. 62C.

Time for taking objection to exercise of jurisdiction.—P. 49, para. 62D.

Limitation.—P. 49.

Power to decide questions of title.—Pp. 50-51, para. 63.

Exclusive jurisdiction of Insolvency Court.—P. 51, para. 64.

Suits by third persons to recover property attached by Receiver.—P. 51, para. 65.

Fictitious transfers and transfers fraudulent within s. 53 of Transfer of Property Act.—P. 52, para. 66.

Hindu sons.—P. 53, para. 67.

Purchaser from Receiver.—P. 53, para. 68.

Suggestions for amending sec. 4.—P. 53, para. 68A.

Procedure under sec. 4.—P. 54A, para. 70A.

Sub-sec. (2).

Res judicata.—P. 54, para. 69.

Sub-sec. (3).

Power of Court to sell disputed interest.—P. 54, para. 70.

5. (1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the

Prov. I. A. same powers and shall follow the same procedure as they respectively have
ss. 5, 6 and follow in regard to civil suits.

Parallel enactments.—P.-t. I. A., s. 90 (1); Prov. I. A., 1907, s. 47.

Where special procedure is prescribed by the Act.—P. 56, para. 77.

Transfer of proceedings.—P. 57, para. 78.

Injunction restraining sale.—P. 57, para. 79.

PART II.

PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE.

Acts of Insolvency.

6. A debtor commits an act of insolvency in each
Acts of Insolvency. of the following cases, namely :—

- (a) if, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally ;
- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors ;
- (c) if, in British India or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent ;
- (d) if, with intent to defeat or delay his creditors,—
 - (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling-house or usual place of business or otherwise absent himself,
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him ;
- (e) if any of his property has been sold in execution of the decree of any Court for the payment of money ;
- (f) if he petitions to be adjudged an insolvent under the provisions of this Act ;
- (g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts ; or
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation.—For the purposes of this section the act of an agent may be the act of the principal. **Prov. I. A. s. 6**

Parallel enactments.—P.-t. I. A., s. 9; Prov. I. A., 1907, s. 4.

Meaning of "Debtor".—P. 62, para. 83.

Foreigners.—Pp. 62-66, para. 84.

Minors.—P. 66, para. 85.

Minor partners.—P. 67, para. 86.

Married women.—Pp. 68-79, para. 87.

Lunatics.—P. 69.

Joint debtors.—P. 70, para. 89.

Partners: Firm.—P. 70, para. 70.

Joint Hindu family.—Pp. 72-73, para. 91.

Corporations and registered companies.—P. 73A.

Traders and non-traders.—P. 73A, para. 93.

Origin and objects of acts of insolvency.—P. 74, para. 94.

Principles common to all acts of insolvency.—Pp. 106-109, para. 138.

Cl. (a)—Transfer for benefit of creditor.

Transfer for benefit of creditors generally.—Pp. 75-76, para. 96.

Act of insolvency committed abroad.—P. 76, para. 97.

Party or privy to transfer for benefit of creditors.—P. 77, para. 98.

Transfer for benefit of creditors void as against Receiver.—P. 77, para. 100.

Cl. (b)—Transfer with intent to defeat or delay creditors.

Transfers with intent to defraud creditors.—P. 77, para. 100.

Intent to defeat or delay creditors.—P. 78, para. 100A.

Transfers fraudulent within statute of Elizabeth and under Transfer of Property Act, sec. 53.—Pp. 78-79, para. 100B.

Transfers fraudulent under Insolvency Acts and those fraudulent under Transfer of Property Act, 1882.—P. 79, para. 100C.

Sale or mortgage of substantially the whole property for past debts.—P. 80, para. 101.

Sale of substantially the whole property for a present consideration.—P. 81, para. 102.

Mortgage of substantially the whole property for a present consideration.—P. 83, para. 103.

Mortgage of substantially the whole property securing existing debt and present advance.—P. 83, para. 104.

Mortgage of substantially the whole property securing existing debt and future advance.—Pp. 84-85, para. 105.

Consideration.—P. 85, para. 106.

After-acquired property.—P. 86, para. 107.

What is whole of debtor's property.—P. 86, para. 108.

Transfer of part only of debtor's property.—P. 87, para. 109.

"Transfers."—P. 88, para. 110.

"Gift."—P. 88, para. 111.

Mortgage by partner of partnership property.—P. 88, para. 112.

Act of insolvency committed abroad.—P. 88, para. 113.

Transfer when void against Receiver.—P. 89, para. 114.

Cl. (c)—Transfer by way of fraudulent preference.

Transfers by way of fraudulent preference.—P. 89, para. 115.

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ss. 6, 7*Cl. (d)—Departure from British India, or from dwelling house or place of business.*

Avoiding creditors.—P. 89, para. 116.

Intent to defeat or delay.—P. 90, para. 117.

Departing or remaining out of British India.—P. 90, para. 118.

Departure or absence from dwelling house or place of business.—P. 91, para. 119.

"Secludes himself."—P. 92, para. 120.

Cl. (e)—Sale in execution.

Sale in execution.—Pp. 92-93, para. 121.

Sale must be one in execution of decree.—P. 94, para. 123.

Sale during pendency of adjudication order.—P. 95, para. 124.

Decree against partners.—P. 95, para. 125.

Cl. (f)—Petition by debtor for adjudication.

Debtor's petition.—P. 95, para. 125A.

Cl. (g)—Notice of suspension of payment.

Notice of suspension of payment.—P. 96, para. 126.

What is notice.—P. 96, para. 127.

What is suspension of payment.—P. 96, para. 128.

Inability to pay.—P. 96, para. 129.

Temporary suspension.—P. 97, para. 130.

Test.—Pp. 97-98, para. 131.

Estoppel of creditor.—P. 99, para. 132.

Notice by agent.—P. 99, para. 133.

Suspension of payment by non-traders.—P. 99, para. 134.

Cl. (h)—Imprisonment in execution of money decree.

Remaining in prison.—P. 99, para. 135.

Explanation—Act of insolvency committed by agent.

Act of insolvency committed by agent.—Pp. 100-103, para. 136.

Partner as agent.—P. 104, para. 137.

Petition.

7. Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

Petition and adjudication.

Explanation.—The presentation of petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.

Parallel enactments.—P.-t. I. A., s. 10; Prov. I. A., 1907, s. 5.

Power to adjudicate.—P. 134, para. 186.

8. No insolvency petition shall be presented against **Prov. I. A.**
any corporation or against any association or company **ss. 8-10**
registered under any enactment for the time being in
force.

Exemption of corpo-
ration, etc., from insol-
vency proceedings.

Parallel enactments.—P.-t. I. A., s. 107; Prov. I. A., 1907, s. 6 (6).

Corporations and registered companies.—P. 73A, para. 92.

Conditions on which
creditor may petition.

9. (1) A creditor shall not be entitled to present
an insolvency petition against a debtor unless—

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and
- (b) the debt is a liquidated sum payable either immediately or at some certain future time, and
- (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

Parallel enactments.—P.-t. I. A., s. 12; Prov. I. A., 1907, s. 6 (4), (5).

Sub-sec. (1).

Who may be a petitioning creditor.—P. 114, para. 148.

Debt must exist before act of insolvency—P. 117, para. 149.

Amount of debt.—P. 117, para. 150.

Debt must be liquidated.—P. 117, para. 151.

What debt insufficient.—P. 118, para. 152.

Joint debt.—P. 118, para. 153.

Act of insolvency must be within three months of petition.—P. 118, para. 154.

Limitation.—P. 119, para. 156.

Sub-sec. (2).

Secured creditor's petition.—P. 119, para. 155.

Conditions on which
debtor may petition.

10. (1) A debtor shall not be entitled to present
an insolvency petition unless he is unable to pay his
debts and—

- (a) his debts amount to five hundred rupees; or
- (b) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money; or
- (c) an order of attachment in execution of such a decree has been made and is subsisting against his property.

**Prov. I. A.
ss. 10, 11**

(2) A debtor in respect of whom an order of adjudication *[whether made under the Presidency-towns Insolvency Act, 1909, or under this Act] has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.

Parallel enactments.—P.-t. I. A., s. 14, Prov. I. A., 1907, s. 6 (3).

Sub-sec. (1).

The debtor must be unable to pay his debts.—P. 142, para. 209.

Debt must amount to Rs. 500.—P. 144, para. 210.

Arrest or imprisonment of debtor.—P. 145, para. 211.

Attachment of debtor's property in execution of decree.—P. 145, para. 212.

Petition by debtor whose adjudication has been annulled for failure to apply for discharge.—P. 145, para. 213.

Sub-sec. (2).

Petition by debtor when adjudication has been annulled owing to failure to apply for discharge.—P. 127, para. 175, p. 145, para. 213.

Second petition by undischarged insolvent—P. 145, para. 213, p. 128, para. 175.

11. Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody :

Courts to which petition shall be presented.

Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice.

Parallel enactments.—P.-t. I. A., s. 11; Prov. I. A., s. 6 (2).

Local jurisdiction.—P. 135, para. 188.

"Ordinarily resides".—P. 135, para. 189, p. 111, para. 142.

Carries on business.—P. 136, para. 192.

Custody within jurisdiction.—P. 136, para. 191.

Jurisdiction and burden of proof.—P. 136, para. 191A.

Where petition presented to wrong Court.—P. 136, para. 192.

* Those words were substituted by s. 4 of the Insolvency (Amendment) Act, 1929 (11 of 1927).

- 12.** Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying complaints.
- Verification of petition. **Prov. I. A. ss. 12, 13**

Parallel enactments.—P.-t. I. A., s. 13 (1) ; Prov. I. A., 1907, s. 6 (1).

Creditor's petition to be in writing and verified.—P. 138, para. 194.

Debtor's petition to be in writing and verified.—P. 146, para. 214.

- 13.** (1) Every insolvency petition presented by a debtor shall contain the following particulars, namely—
- Contents of petitions.

- (a) a statement that the debtor is unable to pay his debts ;
- (b) the place where he ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody ;
- (c) the Court (if any) by whose order he has been arrested or imprisoned, or by which an order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made ;
- (d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him ;
- (e) the amount and particulars of all his property, together with—
 - (i) a specification of value of all such property not consisting of money ;
 - (ii) the place or places at which any such property is to be found ; and
 - (iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ;
- (f) a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)—
 - (i) if such petition has been dismissed, the reasons for such dismissal, or,
 - (ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether previous adjudication has been annulled and, if so, the grounds therefor.

**Prov. I. A.
ss. 13-17**

(2) Every insolvency petition presented by a creditor or creditors shall set forth the particulars regarding the debtor specified in clause (b) of subsection (1), and shall also specify—

- (a) the act of insolvency committed by such debtor, together with the date of its commission ; and
- (b) the amount and particulars of his or their pecuniary claim or claims against such debtor.

Parallel enactments.—P.-t. I. A., s. 15 (1); Prov. I. A., 1907, s. 11 (1).

Sub-sec. (1) (a)—Inability of debtor to pay his debts.—P. 142, para. 209.

Sub-sec. (1) (b)—See notes to s. 11.

Sub-sec. (1) (d)—Particulars of debtor's property and of claims against him—P. 147, para. 216.

Amendment of petition.—P. 120, para. 158.

14. No petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court.

Withdrawal of petitions.

Parallel enactments.—P.-t. I. A., s. 13 (8), s. 15 (2); Prov. I. A., 1907, s. 7.

Withdrawal of petition.—P. 153, para. 227.

No withdrawal after adjudication.—P. 153, para. 228.

15. Where two or more insolvency petitions are presented against the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit.

Consolidation of petitions.

Parallel enactments.—P.-t. I. A., s. 91; Prov. I. A., 1907, s. 8.

Consolidation of petition.—P. 154, para. 229.

16. Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor.

Power to change carriage of proceedings.

Parallel enactments.—P.-t. I. A., s. 92; Prov. I. A., 1907, s. 9.

Power to change carriage of proceedings.—P. 154, para. 230.

17. If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor.

Continuance of proceedings on death of debtor.

Parallel enactments.—P.-t. I. A., s. 93; Prov. I. A., 1907, s. 10.

Continuance of proceedings on death of debtor.—P. 155, para. 231.

18. The procedure laid down in the Code of Civil Procedure, 1908, **Prov. I. A.**
Procedure for admission of petition. with respect to the admission of complaints, shall so far as **ss. 18-21**
 it is applicable, be followed in the case of insolvency petitions.

Parallel enactments.—Prov. I. A., 1907, s. 6 (1).

Admission of creditor's petitions.—P. 138, para. 106.

Admission of debtor's petition.—P. 147, para. 217.

19. (1) Where an insolvency petition is admitted,
Procedure on admission of petition. the Court shall make an order fixing a date for hearing the petition.

(2) Notice of the order under sub-section (1) shall be given to creditors in such manner as may be prescribed.

(3) Where the debtor is not the petitioner, notice of the order under sub-section (1) shall be served on him in the manner provided for the service of summons.

Parallel enactments.—Prov. I. A., 1907, s. 12.

Fixing of date for hearing.—P. 138 and 147, paras. 197 and 218.

20. The Court when making an order admitting the petition may, and where the debtor is the petitioner ordinarily shall,
Appointment of interim receiver. appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct. If an interim receiver is not so appointed the Court may make such appointment at any subsequent time before adjudication, and the provisions of this sub-section shall apply accordingly.

Parallel enactments.—P.-t. I. A., s. 16; Prov. I. A., 1907, s. 13 (2).

Interim receiver.—P. 160, para. 238. See s. 56 (5).

21. At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may
Interim proceedings against debtor. either of its own motion or on the application of any creditor make one or more of the following orders, namely:—

- (1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition; and direct that, in default of giving such security, he shall be detained in the civil prison;
- (2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as

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ss. 21-23**

are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ;

- (3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary ;

Provided that an order under clause (2) or clause (3) shall not be made unless the Court is satisfied that the debtor with intent to defeat or delay his creditors or to avoid any process of the Court,—

- (i) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or
- (ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid.

Parallel enactments.—Prov. I. A., 1907, s. 13.

Interim orders against debtor.—P. 161, para. 239.

Attachment of debtor's property.—P. 162, para. 240.

22. The debtor shall on the making of an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property, and such lists of his creditors and debtors and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments, and generally do all such acts and things in relation to his property as may be required by the Court or receiver or as may be prescribed.

Duties of debtors.

Parallel enactments.—P. t. I. A., s. 33 (1), (2) ; Prov. I. A., 1907, s. 43 (1).

Duties of debtor.—P. 163, para. 241.

23. (1) At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.

Release of debtor.

(2) The Court may at any time order any person who has been released under this section, to be re-arrested and recommitted to the custody from which he was released.

(3) At the time of making any order under this section, the Court shall record in writing its reasons therefor. **Prov. I. A. ss. 23, 24**

[This section is new.]

Release of debtor between admission of petition and adjudication.—
Pp. 163-165, para. 242.

24. (1) On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof of the following matters, namely :—
Procedure at hearing.

(a) that the creditor or the debtor, as the case may be, is entitled to present the petition :

Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon ;

(b) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition ; and

(c) that the debtor has committed the act of insolvency alleged against him.

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor hereon.

(3) The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition.

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence shall be made by the judge, and shall form part of the record of the case.

Parallel enactments.—Prov. I. A., 1907, s. 14 ; cf. P-t. I. A., ss. 13 (2), 90 (3).

Facts to be proved at hearing of debtor's petition.—P. 147, para. 219.

Sub-sec. (1) (a).—See notes to ss. 9 and 10.

Sub-sec. (1) (a) : inability of debtor to pay his debts.—P. 142, para. 209.

Facts to be proved at hearing of creditor's petition.—P. 138, para. 198.

Sub-sec. (2) : Scope of examination of debtor.—P. 139, para. 200.

Debtor as witness.—P. 120, para. 160 ; p. 140, para. 202.

Inquiry into consideration for debt.—P. 140, para. 203.

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ss. 25-27**

25. (1) In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

Dismissal of petition.

(2) In the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.

Parallel enactments.—P-t. I.A., s. 13 (4); Prov. I.A., 1907, s. 15 (1).

Dismissal of creditor's petition.—P. 139, para. 201.

Dismissal of creditor's petition and res judicata.—P. 139, para. 201.

Dismissal of creditor's petition if service on debtor not proved.—P. 140, para. 204.

Power to dismiss petition against some respondents.—P. 157, para. 232.

Dismissal of creditor's petition for sufficient cause.—P. 140, para. 205.

Dismissal of debtor's petition.—P. 148, para. 221.

Dismissal of debtor's petition and res judicata.—P. 148, para. 221A.

26. (1) Where a petition presented by a creditor is dismissed under sub-section (1) of section 25, and the Court is satisfied that the petition was frivolous or vexatious, the Court may, on the application of the debtor, award against such creditor such amount, not exceeding one thousand rupees as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon, and such amount may be realised as if it were a fine.

Award of compensation.

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon.

Parallel enactments.—Prov. I.A., 1907, s. 15 (2), (3).

Compensation for frivolous or malicious petition.—P. 157, para. 235. See also p. 157, para. 234.

Order of Adjudication.

27. (1) If the Court does not dismiss the petition it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge.

Order of adjudication.

(2) The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.

Parallel enactments.—Prov. I.A., 1907, s. 16 (1). *Cf.* P-t. I. A., ss. 13 (5), 15 (1); **Prov. I. A. ss. 27, 28**

Sub-sec. (1).

Order of adjudication on debtor's petition.—P. 148, para. 222.

Refusal to adjudicate on debtor's petition on ground of abuse of process of Court.—Pp. 148-151, para. 223.

Sub-sec. (2).

Extending time for applying for discharge.—P. 151, para. 225.

23. (1) On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.

Effect of an order of adjudication.

(2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose.

(3) For the purposes of sub-section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent.

(4) All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver, and the provisions of sub-section (2) shall apply in respect thereof.

(5) The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

v of 1908.

(6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

(7) An order of adjudication shall relate back to, and take effect from the date of the presentation of the petition on which it is made.

Parallel enactments.—Prov. I. A., 1907, s. 16; P-t. I. A., ss. 33 (3), 17, 52 (2) (c), 52 (2) (a), 52 (1), 17 (Proviso), 51.

Sub-sec. (2).

What is "insolvent's property."—P. 316, para. 486.

Prov. I. A.
s. 28

(a) *Property not divisible among creditors.*

Property held on trust.—P. 318, para. 487.
 Persons holding property in fiduciary capacity.—P. 318, para. 488.
 Right to follow trust property.—P. 319, para. 489.
 Beneficial interest of trustee.—P. 320, para. 490.
 Trust property and reputed ownership.—P. 321, para. 491.
 Specific appropriation.—Pp. 321-326, para. 492.
 Property held by insolvent for specific purpose.—P. 327, para. 493.
 Money advanced for specific purpose.—P. 327, para. 494.
 Banker holding moneys for specific purpose.—Pp. 328-330, para. 495.
 Nature of factor's possession.—P. 330, para. 496.
 Nature of auctioneer's possession.—P. 331, para. 497.
 Position of commission agent.—P. 331, para. 498.
 Artificial funds of the London stock exchange.—P. 332, para. 499.
 Tools of trade, wearing apparel, etc.—P. 333, para. 500.
 Spes successionis.—P. 335, para. 502.

(b). *Property divisible among creditors.*

Property belonging to insolvent at commencement of insolvency.

Contingent and executory interest.—P. 335, para. 502.
 Forfeiture clauses in wills and settlements.—Pp. 335-338, para. 503.
 Forfeiture of lease on insolvency.—P. 338, para. 504.
 Forfeiture of lease on assignment.—P. 338, para. 505.
 Forfeiture of share in partnership.—P. 339, para. 506.
 Provision for compulsory transfer of shares on insolvency.—P. 339, para. 507.
 Additional security to mortgagee on mortgagor's insolvency.—P. 339, para. 508.
 Contracts made by insolvent prior to insolvency.—Pp. 340-342, para. 509.
 Contracts involving personal skill.—P. 342, para. 510.
 Contract of service to be rendered to insolvent.—P. 343, para. 511.
 Goodwill.—P. 344, para. 512.
 Choses in action.—P. 344, para. 513.
 Share in partnership.—P. 344, para. 514.
 Deposit in Provident Fund.—P. 345, para. 515.
 Property abandoned by receiver as worthless.—P. 346, para. 516.
 Patent, copyright.—P. 346, paras. 517 and 518.
 License to seize goods.—P. 346, para. 519.
 Assignment of after-acquired property.—Pp. 347-349, para. 520.
 Assignment of future profits of business.—P. 349, para. 521.
 Insolvency of karta, father, or other member in joint Hindu family.—Pp. 350-352, para. 522.
 Vesting of rights of action in receiver.—P. 353, para. 523.
 When undischarged insolvent may himself sue.—P. 354, para. 524.
 Receiver takes insolvent's property subject to all equities.—P. 355, para. 525.
 Duty of Receiver to do what is honourable : Rule in Ex parte James.—P. 357, para. 526.
 Sale of a mere right to sue.—P. 359, para. 527.
 Personal earnings.—P. 369, para. 537.
 Profits of trade and business.—P. 370, para. 538.
 Bankrupt cannot be compelled to work.—P. 371, para. 539.

Sub-sec. (3).

Reputed ownership.

- Reputed ownership.—P. 409, para. 579.
 History of reputed ownership clause.—P. 375, para. 544.
 When doctrine of reputed ownership applies.—P. 376, para. 545.
 Property must be goods.—P. 377, para. 546.
 Goods must be in possession of insolvent in his trade or business.—
 P. 378, para. 547.
 Goods must be in the possession, order or disposition of the insolvent.—
 P. 383, para. 549.
 Sole possession essential.—P. 386, para. 550.
 At the commencement of the insolvency.—P. 388, para. 552.
 Circumstances giving rise to reputed ownership.—P. 388, para. 552.
 Evidence of reputation of ownership.—P. 392, para. 554.
 Notoriety of change of ownership.—P. 393, para. 556.
 Usage of trade.—P. 393, para. 557.
 The true owner must consent.—P. 394, para. 558.
 Nature of true owner's consent.—P. 395, para. 559.
 Insolvent must not be the true owner.—P. 397, para. 560.
 True owner.—P. 398, para. 561.
 Trustees.—P. 399, para. 563.
 Executors and administrators.—P. 400, para. 564.
 Executor de son tort.—P. 400, para. 564.
 Beneficiaries.—P. 400, para. 565.
 Builders.—P. 400, para. 567.
 Partners.—P. 400, para. 568.
 Factors and agents for sale.—P. 401, para. 569.
 Bailee for safe custody.—P. 402, para. 570.
 Sale or return.—P. 402, para. 571.
 Hire purchase agreement.—P. 402, para. 572.
 How reputed ownership may be determined.—P. 402, para. 573.
 Determination of possession.—P. 403, para. 574.
 Determination of consent.—P. 405, para. 575.
 Determination of consent in the case of goods.—P. 406, para. 576.
 Determination of consent in the case of trade debts.—P. 407, para. 577.
 True owner's right of proof.—P. 408, para. 578.

Sub-sec. (4).

After-acquired property.

- What is after-acquired property.—P. 360, para. 528. See also p. 347, para. 520.
 Law relating to after-acquired property.—P. 367, para. 536.

Sub-sec. (5).

Salary, etc.

- Tools of trade, wearing apparel, etc.—P. 334, para. 500.
 Salary of public officers and others, etc.—P. 372, para. 540A.

Sub-sec. (6).

Secured creditors.

- Who are secured creditors.—P. 182, para. 258.
 Secured creditors not affected by order of adjudication.—P. 183, para. 259.
 Secured creditors and leave to sue.—P. 183, para. 260.
 Only equity of redemption vests in Receiver.—P. 184, para. 261.
 Receiver as a party to a mortgage suit.—P. 185, para. 262.

**Prov. I. A.
ss. 28-31**

Sub-sec. (7).

Relation back of Receiver's title.

Meaning of "relation back".—P. 411, para. 580.

History of doctrine of relation back.—P. 411, para. 581.

Commencement of insolvency.—Pp. 412-415, para. 582.

Transactions impeachable under insolvency law.—P. 415, para. 583.

Transactions not impeachable under insolvency law.—P. 415, para. 584.

Results of doctrine of relation back.—P. 416, para. 585.

Payments and transfers by insolvent and to insolvent.—P. 417, paras. 586 to 589.

Trustees under void deeds of transfer.—P. 417, para. 589.

Sham companies.—P. 418, para. 590.

29. Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose.

Stay of pending proceedings.

Parallel enactments.—This section is new. See P.-t. I. A., s. 18 (3).

Power to stay suit.—P. 187, para. 266.

Power to stay discretionary.—P. 187, para. 267.

What proceedings may be stayed and what not.—P. 187, para. 268.

Whether suits commenced after order of adjudication and without leave can be stayed under this section.—P. 188, para. 269.

Stay of execution against insolvent's property.—P. 189, para. 270.

Stay of execution against insolvent's person.—P. 189, para. 271.

Secured creditors and stay of suit.—P. 189, para. 272.

30. Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made, shall be published in the local official Gazette and in such other manner as may be prescribed.

Publication of order of adjudication.

Parallel enactments.—This section is new. See P.-t. I. A., s. 20, Prov. I. A. 1907, s. 16 (7).

Proceedings consequent on order of adjudication.

31. (1) Any insolvent in respect of whom an order of adjudication has been made may apply to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention.

Protection order.

(2) A protection order may apply either to all the debts of the debtor, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit.

(3) A protection order shall protect the insolvent from being arrested **Prov. I. A.** or detained in prison for any debt to which such order applies, and any **ss. 31-33** insolvent arrested or detained contrary to the terms of such an order shall be entitled to his release :

Provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order.

Parallel enactments.—This section is new. See P.-t. I. A., s. 25.

Protection order.—P. 126, para. 320.

Discretion of Court.—P. 193, para. 278.

Refusal of protection order.—P. 194, para. 281.

32. At any time after an order of adjudication has been made, the Court may, if it has reason to believe on the application of any creditor or the receiver, that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent order his release on such terms as to security as may be reasonable or necessary, or if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months.

Power to arrest after adjudication.

Parallel enactments.—This section is new. See P.-t. I. A., s. 21.

Arrest after adjudication.—P. 217, para. 323.

33. (1) When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall, by order determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of debts, respectively, and shall frame a schedule of such persons and debts :

Schedule of creditors.

Provided that, if, in the opinion of the Court the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule.

(2) A copy of every such schedule shall be posted in the Court-house.

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the ¹[receiver] and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application.

¹This word was substituted by s. 2 of the Provincial Insolvency (Amendment) Act, 1926, (39 of 1926).

**Prov. I. A.
ss. 33-35**

Parallel enactments.—P.-t. I. A., Sch. II, r. 1, s. 46 (4) (proviso); Prov. I. A., 1907, s. 24.

Framing of schedule.—P. 218, para. 325.

Inquiry into consideration for debt.—P. 218, para. 326.

Proof after framing of schedule and before discharge.—P. 218, para. 327.

Proof after discharge.—P. 219, para. 328.

Delegation of power to frame schedule to Official Receiver.—P. 219, para. 329.

Effect of omission to prove debt.—P. 220, para. 330.

34. (1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act.

Debts provable under the Act.

(2) Save as provided by sub-section (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.

Parallel enactments.—P.-t. I. A., s. 46 (1) (3); Prov. I. A., 1907, s. 28 (2).

Debts not provable in insolvency.—P. 283, para. 429.

Unliquidated damages not arising out of contract or breach of trust.—P. 288, paras. 436 and 437.

Damages for tort.—P. 283, para. 430.

Contingent debts incapable of being fairly estimated.—P. 284, para. 432.

Debts not provable by general policy of law.—P. 285, para. 433.

Inquiry into consideration for debt.—P. 286, para. 434.

Debts provable in insolvency.—P. 287, para. 435.

Damages arising out of contract.—P. 288, para. 436.

Damages arising out of breach of trust.—P. 288, para. 437.

Contingent liabilities provable in insolvency.—P. 288, para. 438.

Other liabilities provable in insolvency.—P. 290, para. 439.

Persons by whom proof to be made.—P. 291, para. 440.

Benamidar.—P. 291, para. 440.

Executor's right of retainer.—P. 291, para. 441.

Holders of bills of exchange.—P. 291, para. 442.

Double proof.—P. 292, para. 443.

Proof by surety.—Pp. 292-294, para. 444.

Accommodation bill.—P. 294, para. 445.

Annulment of adjudication.

35. Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. ¹[And the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication

Power to annul adjudication of insolvency.

¹ These words were added by s. 5 of the Insolvency (Amendment) Act, 1927 (11 of 1927).

made on the petition of a debtor who was, by reason of the provisions of **Prov. I. A.**
sub-section (2) of section 10, not entitled to present such petition.] **ss. 35-38**

Parallel enactments.—P.-t. I. A., s. 21 ; Prov. I. A., 1907, s. 42 (1).

Power to annul.—P. 223, para. 334.

Who may apply for annulment.—P. 224, para. 335.

When adjudication may be annulled.—P. 224, para. 336.

(1) where debtor ought not to have been adjudged insolvent.—P. 224, para. 337.

(2) where debts are paid in full.—P. 224, para. 338.

No discretion to refuse annulment.—P. 226, para. 340.

Inherent power to annul adjudication.—P. 226, para. 341.

Annulment refused.—P. 228, para. 342.

(3) where debtor's petition presented without leave of Court.—P. 229, para. 343.

Limitation.—P. 229, para. 344.

36. If, in any case in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be conveniently distributed by such other Court, the Court may annul the adjudication or stay all proceedings thereon.

Power to cancel one of concurrent orders of adjudication.

Parallel enactments.—P.-t. I. A., s. 22 ; Prov. I. A., 1907, s. 17.

Power to annul one of concurrent orders of adjudication.—P. 230, para. 345.

Concurrent orders of adjudication.—P. 230, para. 346.

Power to annul or stay proceedings discretionary.—P. 230, para. 347.

37. (1) Where an adjudication is annulled, all sales and disposition of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid, but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

Proceedings on annulment.

(2) Notice of every order annulling an adjudication shall be published in the local official Gazette and in such other manner as may be prescribed.

Parallel enactments.—P.-t. I. A., s. 23 ; Prov. I. A., 1907, s. 42 (2), (3).

Effect of annulment.—P. 238, para. 357.

Effect of annulment on suits.—P. 239, para. 358.

Vesting of property in person appointed by Court.—P. 240, para. 359.

Effect of annulment on forfeiture clauses.—P. 335, para. 503.

Compositions and schemes of arrangement.

38. (1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration

Compositions and schemes of arrangement.

Prov. I. A. ss. 38, 39 of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed.

(2) If, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is, in the opinion of the Court, calculated to benefit the general body of creditors.

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

(5) If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate.

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case the Court may either approve or refuse to approve the proposal.

Parallel enactments.—P.-t. I. A., ss. 28 (1) to (3), 29 (4) to (7) ; Prov. I. A., 1907, s. 27.

Composition apart from Insolvency Acts.—P. 241, para. 361.

Composition after presentation of petition.—P. 242, para. 362.

Composition after adjudication.—P. 242, para. 363.

Proposal of composition or scheme.—P. 242, para. 364.

Notice to creditors.—P. 243, para. 365.

Acceptance by creditors.—P. 243, para. 366.

Approval of proposal by Court.—P. 244, para. 369.

Object of approval of Court.—P. 245, para. 370.

Matters to be considered in approving proposal.—P. 245, para. 371.

Power of Court.—P. 246, para. 372.

When Court absolutely bound to refuse.—P. 246, para. 373.

When Court bound to refuse unless conditions fulfilled.—Pp. 247-249, para. 374.

Withdrawals and releases of debts.—P. 249, para. 375.

39. If the Court approves the proposal the terms shall be embodied in an order of the Court, and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein.

Parallel enactments —P.-t. I. A., s. 30 ; Prov. I. A., 1907, s. 27 (7).

Annulment of adjudication.—P. 249, para. 376.

Jurisdiction of Court after approval of composition.—P. 250, para. 377.

Effect of approval on rights of creditors.—P. 253, para. 379.

Creditor's remedy on default in payment.—P. 255, para. 379B.

Secured creditors.—P. 256, para. 380.

Expunging debts from schedule.—P. 256, para. 381.

Right of trustees to sue.—P. 256, para. 382.

Costs of Receiver.—P. 256, para. 383.

Revesting of property in insolvent on annulment.—P. 256, para. 384.

40. If default is made in the payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, re-adjudge the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is re-adjudged insolvent under this section, all debts provable in other respects which have been contracted before the date of such re-adjudication shall be provable in the insolvency.

Power to re-adjudge
debtor insolvent.

Parallel enactments.—P.t. I. A., s. 31; Prov. I. A., 1907, s. 27 (8).

Re-adjudging debtor insolvent.—P. 257, para. 385.

Death of insolvent after approval of composition.—P. 257, para. 386.

Liability of surety after annulment of composition.—P. 257, para. 387.

Debts contracted before date of re-adjudication.—P. 257, para. 389.

Discharge.

41. (1) A debtor may at any time after the order of adjudication and shall, within the period specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto.

Discharge.

(2) Subject to the provisions of this section, the Court may, after considering the objections of any creditor and, where a receiver has been appointed, the report of the receiver—

- (a) grant or refuse an absolute order of discharge; or
- (b) suspend the operation of the order for a specified time; or
- (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

Parallel enactments.—P.t. I. A., ss. 38 (1), 40; Prov. I. A., 1907, s. 44 (1), (2).

Historical review.—P. 258, para. 391.

Powers of Court as to discharge.—P. 261, para. 398.

Application for discharge.—P. 258, para. 392.

Notice.—P. 259, para. 393.

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ss. 41, 42**

Receiver's report.—P. 259, para. 394.
Hearing of application.—P. 259, para. 395.
Discretion of Court.—P. 260, paras. 396 and 397.
Matters to be considered by the Court.—P. 260, para. 397.
Powers of Court as to discharge.—P. 261, para. 398.
Immediate unconditional discharge.—P. 271, para. 404.
Suspension of discharge.—P. 271, para. 405.
Conditional discharge.—P. 272, para. 406.

Cases in which Court
must refuse an absolute
discharge.

42. (1) The Court shall refuse to grant an absolute order of discharge under section 41 on proof of any of the following facts, namely:—

- (a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible ;
- (b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency ;
- (c) that the insolvent has continued to trade after knowing himself to be insolvent ;
- (d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it ;
- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ;
- (f) that the insolvent has brought on or contributed to his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs ;
- (g) that the insolvent has, within three months preceding the date of the presentation of the petition, when unable to pay his debts as they became due, given an undue preference to any of his creditors ;
- (h) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors ;
- (i) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any other fraud or fraudulent breach of trust.

(2) For the purposes of this section, the report of the receiver shall be deemed to be evidence ; and the Court may presume the correctness of any statement contained therein.

(3) The powers of suspending, and of attaching conditions to, an insolvent's discharge may be exercised concurrently. **Prov. I. A. ss. 42-44**

Parallel enactments.—P.-t. I. A., s. 39; Prov. I. A., 1907, s. 44 (3) to (5).

Restrictions on powers of Court re discharge.—P. 265, para. 402.

Facts which prevent immediate discharge.—Pp. 266-271, para. 403.

Immediate unconditional discharge.—P. 271, para. 404.

Suspension of discharge.—P. 271, para. 405.

Conditional discharge.—P. 272, para. 406.

Refusal of discharge with liberty to apply.—P. 273, para. 407.

Renewal of application for discharge: Review.—P. 274, para. 408.

Refusal of discharge not a termination of insolvency proceedings.—P. 275, para. 410.

43. (1) If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly.

Adjudication to be annulled on failure to apply for discharge.

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made.

Parallel enactments.—This section is new. See P.-t. I. A., s. 41.

Extension of time for applying for discharge.—P. 151, para. 225.

Whether power to annul discretionary.—P. 233, para. 351.

Application for annulment and notice.—P. 234, para. 352.

No automatic annulment of adjudication.—P. 235, para. 353.

Insolvency proceedings do not terminate ipso facto on annulment.—P. 236, para. 354.

Remedy of debtor whose adjudication is annulled.—P. 236, para. 355.

44. (1) An order of discharge shall not release the insolvent from—

Effect of order of discharge.

- (a) any debt due to the Crown;
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party;
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party; or
- (d) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts provable under this Act.

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(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

Parallel enactments.—P.-t. I. A., s. 45; Prov. I. A., 1907, s. 45.

Excepted debts.—P. 276, para. 414.

Provable debts and discharge.—P. 278, para. 415.

Debts not provable and discharge.—P. 278, para. 416.

Order of discharge and surety.—P. 278, para. 417.

Promise to pay debt barred by discharge.—P. 279, para. 418.

Property acquired by insolvent after discharge.—P. 279, para. 419.

Order of discharge conclusive evidence of insolvency.—P. 279, para. 420.

Criminal liability.—P. 280, para. 421.

Effect of Indian and foreign orders of discharge.—P. 280, para. 422.

Discharge does not terminate insolvency proceedings.—P. 280, para. 423.

PART III.

ADMINISTRATION OF PROPERTY.

Method of proof of debts.

45. A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Debt payable at a future time.

Parallel enactments.—P.-t. I. A., Sch. II, r. 24; Prov. I. A., 1907, s. 29.

Debts payable at future date.—P. 306, para. 465. See also notes under sec. 48.

46. Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

Mutual dealings and set-off.

Parallel enactments.—P.-t. I. A., s. 47; Prov. I. A., 1907, s. 30.

Earlier law as to set-off.—P. 308, para. 469.

Set-off under Civil Procedure Code.—P. 308, para. 470.

What are mutual dealings.—P. 308, para. 471.

No set-off unless claims result in pecuniary liabilities.—P. 309, para. 472.

Debts must be between same parties.—P. 310, para. 473.

Debts must be due in same right.—P. 310, para. 474.

Contributory of company.—P. 310, para. 475.

Costs.—P. 311, para. 476.

Date for ascertaining balance.—P. 311, para. 477.

47. (1) Where a secured creditor realises his security, he may prove **Prov. I. A.**
for the balance due to him, after deducting the net **ss. 47, 48**
Secured creditor. amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realise or relinquish his security he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

Parallel enactments.—P.-t. I. A., Sch. II, rr. 9, 11, 15 ; Prov. I. A., 1907, s. 31.

Rights of secured creditors in general.—P. 298, para. 450.

Proof by secured creditors.—P. 298, para. 451.

Realization.—P. 298, para. 452.

Surrender of security.—P. 299, para. 453.

Assessment of value.—P. 299, para. 454.

Amendment where valuation made on a mistaken estimate.—P. 300, para. 455.

Amendment where security subsequently realised.—P. 301, para. 456.

Penalty for non-compliance with provisions of this section.—P. 301, para. 457.

48. (1) On any debt or sum certain whereon interest is not reserved
Interest. or agreed for, and which is overdue when the debtor
is adjudged an insolvent, and which is provable under
this Act, the creditor may prove for interest at a rate not exceeding six
per centum per annum—

(a) if the debt or sum is payable by virtue of a written instrument at a certain time from the time when such debt or sum was payable to the date of such adjudication ; or

(b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

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(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

Parallel enactments.—P.-t. I. A., Sch. II, r. 23 ; Prov. I. A., 1907, s. 32.

Proof for interest as a rule allowed only up to adjudication.—P. 304, para. 462.

Where interest is not stipulated for.—P. 305, para. 463.

Where interest is stipulated for.—P. 305, para. 464.

Debts payable at a future date.—P. 306, para. 465.

Interest after date of adjudication order.—P. 307, para. 466.

Interest on mortgage debt.—P. 307, para. 467.

Usurious Loans Act.—P. 307, para. 467A.

49. (1) A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit
Mode of proof. verifying the debt.

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers.

Parallel enactments.—P.-t. I. A., Sch. II, r. 2 ; Prov. I. A., 1907, s. 25.

Mode of proof.—P. 296, para. 447.

Lapse of time no bar to proof.—P. 494, para. 707.

50. (1) Where the receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.
Disallowance and reduction of entries in schedule.

(2) The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor.

Parallel enactments.—P.-t. I. A., Sch. II, rr. 26, 27 ; Prov. I. A., 1907, s. 26.

Expunging and reducing proof.—P. 296, para. 448.

Effect of insolvency on antecedent transactions.

51. (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition.
Restriction of rights of creditors under execution.

(2) Nothing in this section shall affect the rights of a secured creditor **Prov. I. A.**
in respect of the property against which the decree is executed. **ss. 51-53**

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

Parallel enactments—P.-t. I. A., s. 53; Prov. I. A., 1907, s. 34.

The dividing line—P. 419, para. 593.

English law—P. 420, para. 594.

Attachment—P. 421, para. 595.

Realization of assets—P. 421, para. 596.

Garnishee notice—P. 421, para. 597.

Order for rateable distribution—P. 422, para. 598.

Receiver of mortgaged property in a mortgage suit—P. 422, para. 599.

Secured creditors—P. 422, para. 600.

Money in Court and secured creditors—P. 422, para. 601.

Rights of bona fide purchaser at execution sale—P. 176, para. 255.

52. Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.

Duties of Court executing decree as to property taken in execution.

Parallel enactments—P.-t. I. A., s. 54; Prov. I. A., 1907, s. 35.

Sale by executing Court after notice of adjudication order—P. 425, para. 604.

Application for delivery of possession—P. 426, para. 605.

Property in possession of Court—P. 427, para. 606.

Costs of execution—P. 427, para. 606A.

Secured creditors—P. 427, para. 607.

53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent [on a petition presented]¹ on a petition presented within two years after

Avoidance of voluntary transfer.

¹ Inserted by s. 6 of Act 10 of 1930.

Prov. I. A. the date of the transfer, be voidable as against the receiver and may be ss. 53, 54 annulled by the Court.

Parallel enactments.—P.-t. I. A., s. 55 ; Prov. I. A., 1907, s. 36.

History of the section.—P. 428, para. 609.

Whether donee liable if money or property given has been spent or alienated.—P. 428, para. 610.

Burden of proof.—P. 429, para. 611.

Exclusive jurisdiction of Insolvency Court.—Pp. 429-431, para. 612.

Suits by secured creditors to realise their security.—P. 431, para. 613.

Application to set aside voluntary transfers.—P. 431, para. 614.

Settlement in consideration of marriage.—P. 433, para. 615.

"Purchaser for valuable consideration."—P. 433, para. 616.

Transfer partly for and partly without consideration.—P. 433, para. 617.

"In good faith."—P. 434, para. 619.

Onus of proving good faith and consideration.—P. 434, para. 619.

"Void."—P. 434, para. 620.

How period of two years to be calculated.—P. 435, para. 621.

Transfers executed more than two years before insolvency.—P. 436, para. 622.

Extent of avoidance.—P. 437, para. 623.

Incumbrances created by settlor after settlement.—P. 437, para. 624.

Transferees from donees.—P. 437, para. 625.

Trustees' lien for costs.—P. 438, para. 626.

Set-off.—P. 438, para. 627.

Property outside local limits.—P. 438, para. 628.

Report of receiver.—P. 439, para. 630.

Transfer under order of Court.—P. 439, para. 630.

54. (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

Parallel enactments.—P.-t. I. A., s. 56 ; Prov. I. A., 1907, s. 37.

Object of doctrine of fraudulent preference.—P. 440, para. 631.

Previous enactments.—P. 440, para. 632.

Exclusive jurisdiction of Insolvency Court.—P. 429, para. 612.

Essentials of fraudulent preference.—P. 441, para. 633.

(1) Inability to pay debts.—P. 441, para. 634.

(2) Person preferred must be a creditor.—P. 442, para. 635.

(3) There must have been preference in fact.—P. 443, para. 636.

(4) View of preferring creditor.—P. 443, para. 637

Burden of proof.—P. 444, para. 638.

Evidence of intent to prefer.—P. 445, para. 639.

Good faith of preferred creditor immaterial.—P. 445, para. 640.

Pressure.—Pp. 446-447, para. 641.

Threat of legal proceedings.—P. 448, para. 643.

View of benefiting debtor himself.—P. 448, para. 643.

Other circumstances negating intent to prefer.—P. 449, para. 644.

Agent.—P. 450, para. 645.

(5) Adjudication must have been on petition presented within three months.—P. 450, para. 646.

Fraudulent preference is voidable, not void.—P. 451, para. 646A.

Proof by creditor fraudulently preferred.—P. 452, para. 647.

Application by whom to be made.—P. 452, para. 647A.

Preference not avoided for benefit of particular creditor.—P. 453, para. 648.

Position of third persons making title in good faith.—P. 453, para. 649.

Limitation.—P. 454, para. 650.

Payments made after presentation of petition.—P. 454, para. 651.

¹[54A. A petition for the annulment of any transfer under section 53,

By whom petitions for
annulment may be
made.

or of any transfer, payment, obligation or judicial proceeding under section 54, may be made by the receiver or, with the leave of the Court, by any creditor who has

proved his debt and who satisfies the Court that the receiver has been requested and has refused to make such petition].

Application by whom to be made.—P. 431, para. 614, p. 452, para. 647A.

55. Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences nothing in this Act shall invalidate in the case of an insolvency—

Protection of bona
fide transactions.

- (a) any payment by the insolvent to any of his creditors ;
- (b) any payment or delivery to the insolvent ;
- (c) any transfer by the insolvent for valuable consideration ; or
- (d) any contract or dealing by or with the insolvent for valuable consideration.

¹ This section was inserted by s.3 of the Provincial Insolvency (Amendment) Act, 1926 (39 of 1926).

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Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

Parallel enactments.—P.-t. I. A., s. 57 ; Prov. I. A., 1907, s. 38.

Transaction must be bona fide.—P. 455, para. 653.

Dealings by insolvent in respect of his property.—P. 456, para. 654.

(1) **Transactions before commencement of insolvency.**—P. 457, para. 655.

(2) **Transactions between commencement and adjudication order.**—
Pp. 457-460, para. 656.

Proceedings in invitum.—P. 461, para. 657.

Payment by insolvent.—P. 461, paras. 658 and 659.

Payment and delivery to insolvent.—P. 462, para. 660.

Incomplete transfer for value.—P. 463, para. 661.

Valuable consideration.—P. 463, para. 662.

Subsequent bona fide purchasers for value.—P. 464, para. 665.

Debenture holders' rights.—P. 464, para. 666.

Suit by insolvent after petition and before adjudication order.—
P. 465, para. 667.

(3) **Transactions after adjudication order.**—P. 465, para. 668.

Realisation of Property.

56. (1) The Court may, at the time of the order of adjudication, or at any time afterwards appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.

Appointment of
receiver.

(2) Subject to such conditions as may be prescribed, the Court may—

- (a) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property ; and
- (b) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent.

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof :

Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

(4) Where a receiver appointed under this section—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the balance due from him thereon as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence.

the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him. **Prov. I. A. ss. 56, 57**

(5) The provisions of this section shall apply, so far as may be, to interim receivers appointed under section 20.

Parallel enactments.—P.-t. I. A., s. 77; Prov. I. A., 1907, s. 18.

Sub-sec. (1).

Appointment of Receiver.—P. 518, para. 763.

Sub-sec. (2).

Security to be given by Receiver.—P. 519, para. 764.

Remuneration of Receiver.—P. 519, para. 765.

Sub-sec. (3).

Possession of property by Receiver.—P. 475, para. 684.

Power of Court to remove persons from possession.—P. 476, para. 685.

Limitation on power of Court to remove persons from possession.—P. 477, para. 686.

Contempt of Court.—P. 478, para. 687.

Sub-sec. (4).

Negligence or wilful default of Receiver.—P. 519, para. 766.

57. (1) The Local Government may appoint such persons as it thinks fit (to be called "Official Receivers") to be receivers Power to appoint Official Receivers. under this Act within such local limits as it may prescribe.

(2) Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the receiver for the purpose of every order appointing a receiver or an interim receiver issued by any such Court, unless the Court for special reasons otherwise directs.

(3) Any sum payable under clause (b) of sub-section (2) of section 56 in respect of the services of an Official Receiver shall be credited to such fund as the Local Government may direct.

(4) Every Official Receiver shall receive such remuneration out of the said fund or otherwise as the Local Government may fix in this behalf, and no remuneration whatever beyond that so fixed shall be received by the Official Receiver as such.

Parallel enactments.—P.-t I. A., s. 81; Prov. I. A., 1907, s. 19.

Appointment of Official Receiver.—P. 520, para. 768.

Sale by Official Receiver.—P. 520, para. 769.

Powers of Official Receiver.—P. 521, para. 770.

Remuneration of Official Receiver.—P. 521, para. 771.

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ss. 58, 59**

58. Where no receiver is appointed, the Court shall have all the rights of and may exercise all the powers conferred on a receiver under this Act.

Power of Court if no receiver appointed.

Parallel enactments—Prov. I. A., 1907, s. 23.

Powers of Court where no Receiver appointed.—P. 522, para. 773.

59. Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may—

Duties and powers of receiver.

- (a) sell all or any part of the property of the insolvent ;
- (b) give receipts for any money received by him ; and may, by leave of the Court, do all or any of the following things, namely :—
- (c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;
- (d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent ;
- (e) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court ;
- (f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit ;
- (g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts ;
- (h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ; and
- (i) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

Parallel enactments.—P.-t. I. A., s. 98 ; Prov. I. A., 1907, s. 20.

Powers of Receiver as to realization of property.—P. 480, para. 689.

Powers which may be exercised without leave of Court.—P. 480, para. 690

Powers which may be exercised with leave of Court.—Pp. 482-485, para. 691.

Suits by or against Receiver.—P. 486, paras. 694 & 695.

No leave necessary to sue Receiver.—P. 488, para. 696.

Notice under sec. 80 of Civil Procedure Code.—P. 488, para. 697.

Notice under O. XXI, r. 22, of Civil Procedure Code.—P. 488, para. 698.

Insolvency of plaintiff pending suit.—P. 489, para. 699a

Insolvency of defendant pending suit.—P. 489, para. 700.

Distribution of dividends.—P. 492, para. 702.

¹ [59A. (1) The Court, if specially empowered in this behalf by an order of the Local Government, or any officer of the Court so empowered by a like order, may, on the application of the receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in the prescribed manner any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court or such officer, as the case may be, may deem capable of giving information respecting the insolvent or his dealings or property, and the Court or such officer may require any such person to produce any documents in his custody or power relating to the insolvent or to his dealings or property.

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ss. 59A, 60

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court or such officer at the time appointed, or refuses to produce any such document, having no lawful impediment made known to and allowed by the Court or such officer, the Court or such officer may, by warrant, cause him to be apprehended and brought up for examination.

(3) The Court or such officer may examine any person so brought before it or him concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.]

Parallel enactments.—This section is new. See P.-t. I. A., s. 36.

Examination of third persons.—P. 220, para. 331 ; pp. 203-213, paras 300-314.

60. (1) In any local area in which a declaration has been made under section 68 of the Code of Civil Procedure, 1908, and is in force, no sale of immovable property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver, but, after the other property of the insolvent has been realised the Court shall ascertain—

Special provisions in regard to immovable property.

- (a) the amount required to satisfy the debts proved under this Act after deducting the monies already received ;
- (b) the immovable property of the insolvent remaining unsold ; and
- (c) the incumbrances (if any) existing thereon ; and shall forward a statement to the Collector containing the particulars aforesaid ; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by paragraphs 2 to 10 of the Third Schedule to the said Code as he thinks fit, and subject to the provisions of those paragraphs so far as they are applicable and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers.

¹ This section was inserted by s. 4 of the Provincial Insolvency (Amendment) Act, 1926 (39 of 1926).

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ss. 60, 61**

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immovable property; and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order.

Parallel enactments.—Prov. I. A., 1907, s. 21.

Special provisions as to immovable property paying revenue to Government.—P. 479, para. 688.

Distribution of Property.

Priority of debts.

61. (1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—

(a) all debts due to the Crown or to any local authority; and

(b) all salary or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition.

(2) The debts specified in sub-section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub-section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them.

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference.

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per cent. per annum on all debts entered in the schedule.

Parallel enactments.—P. t. I. A., s. 49; Prov. I. A., 1907, s. 33.

Priority of debts.—P. 311, para. 479.

Administration of estates of partners.—P. 313, para. 480.

Proof in respect of distinct contracts.—P. 314, para. 481.

Proof by a partner against a partner.—P. 315, para. 482.

Calculation of dividends.

62. (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet— **Prov. I. A. ss. 62-64**

- (a) debts provable under this Act, and appearing, from the insolvent's statements or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs.
- (b) debts provable under this Act, the subject of claims not yet determined;
- (c) disputed proofs or claims; and
- (d) the expenses necessary for the administration of the estate or otherwise.

(2) Subject to provisions of sub-section (1), all money in hand shall be distributed as dividends.

Parallel enactments.—P.-t. I. A., s. 71; Prov. I. A., 1907, s. 39 (1), (2).

Calculation of dividends.—P. 492, para. 703.

When declaration of dividend may be set aside.—P. 493, para. 706.

Lapse of time no bar to proof.—P. 494, para. 707.

Dividend not a debt.—P. 494, para. 708.

Rights of assignee of dividend.—P. 495, para. 709.

Reduction of proof.—P. 495, para. 710.

Dividend payable to estate of deceased person.—P. 495, para. 711.

Joint and separate dividends.—P. 495, para. 712.

Estate administered in two countries.—P. 496, para. 716.

63. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividends; but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

Right of creditor who has not proved debt before declaration of a dividend.

Parallel enactments.—P.-t. I. A., s. 72; Prov. I. A., 1907, s. 39 (3).

Lapse of time no bar to proof.—P. 494, para. 707.

64. When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend; but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

Final dividend.

**Prov. I. A.
ss. 64-67A**

Parallel enactments.—P.-t. I. A., s. 73; Prov. I. A., 1907, s. 39 (4).

Final dividend.—P. 493, para. 704.

Notice of final dividend.—P. 493, para. 705.

When declaration of dividend may be set aside.—P. 493, para. 706.

Lapse of time no bar to proof.—P. 494, para. 707.

Dividend not a debt.—P. 494, para. 708.

65. No suit for a dividend shall lie against the receiver; but where the receiver refuses to pay any dividend, the Court may, on the application of any creditor who is entered in the schedule, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

Parallel enactments.—P.-t. I. A., s. 74; Prov. I. A., 1907, s. 39 (5).

66. (1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct.

(2) The Court may from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his estate; but any such allowance may, at any time, be varied or determined by the Court.

Parallel enactments.—P.-t. I. A., s. 75; Prov. I. A., 1907, s. 40.

Management by and allowance to insolvent.—P. 495, para. 714.

67. The insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings taken thereunder.

Parallel enactments.—P.-t. I. A., s. 76; Prov. I. A., 1907, s. 41.

Right of insolvent to surplus.—P. 496, para. 715.

Attachment of surplus.—P. 496, para. 715A.

¹ **[67A.]** (1) The Court may, if it thinks fit, authorise the creditors who have proved their debts to appoint a committee of inspection for the purpose of superintending the administration of the insolvent's property by the receiver.

(2) The persons appointed to a committee of inspection shall be creditors who have proved their debts or persons holding general powers-of-attorney from such creditors.

(3) The committee of inspection shall have such powers of control over the proceedings of the receiver as may be prescribed.]

Parallel enactments.—This section is new. See P.-t. I. A., s. 88.

Committee of inspection.—P. 497, para. 720.

¹ This section was inserted by s. 5 of the Provincial Insolvency (Amendment) Act, 1926 (39 of 1926).

Appeal to Court against receiver.

68. If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of; and make such order as it thinks just : **Prov. I. A. ss. 68, 69**

Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of.

Parallel enactments.—P. t. I. A., s. 86 ; Prov. I. A., 1907, s. 22.

Application to Court against decision of Receiver.—P. 560, para. 834.

Act or decision of the Receiver.—P. 561, para. 835.

Who may apply.—P. 561, para. 836.

The insolvent.—P. 561, para. 837.

Creditor.—P. 561, para. 838.

Any other person aggrieved.—P. 561, para. 839.

Sale by Receiver.—P. 562, para. 840.

Receiver as a party to the application.—P. 562, para. 841.

Seizure of property of third person by Receiver.—P. 563, para. 842.

Limitation for application.—P. 563, para. 843.

Appeal from orders of Official Receiver.—P. 563, para. 844.

PART IV.

Penalties.

69. If a debtor whether before or after the making of an order of adjudication,—

Offences by debtors.

- (a) wilfully fails to perform the duties imposed on him by section 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to any person authorised by the Court to take possession of it, or
- (b) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,
 - (i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or
 - (ii) has kept or caused to be kept false books, or
 - (iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or

Prov. I. A.
ss. 69-71

- (c) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors,—
- (i) has discharged or concealed any debt due to or from him, or
 - (ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,

he shall be punishable on conviction¹ * * with imprisonment which may extend to one year.

Parallel enactments.—P.-t. I. A., s. 103; Prov. I. A., 1907, s. 43 (2).

Penalties under English law.—P. 498, para. 721.

Insolvency offences under the Indian law.—P. 499, para. 722.

Offences which can be committed by any person who is adjudged insolvent.—P. 499, para. 723.

Failure to perform duties imposed upon insolvent.—P. 500, para. 724.

Withholding or preventing production of books or documents.—P. 500, para. 725.

Omission to make entries.—P. 501, para. 726.

Giving undue preference.—P. 501, para. 727.

Fraudulently making away with property.—P. 501, para. 728.

Burden of proof.—P. 501, para. 729.

When offence must have been committed.—P. 502, para. 730.

Effect of offences on discharge.—P. 502, para. 731.

Offences which can be committed by the insolvent or others.—P. 507, para. 740.

Offences which can be committed by any person other than the bankrupt—P. 507, para. 741.

²[70. Where the Court is satisfied, after such preliminary inquiry, if any, as it thinks necessary, that there is ground for inquiring into any offence referred to in section 69 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.]

Procedure on charge under section 69.

Parallel enactments.—This section is new. See P.-t. I. A., s. 104.

Complaint by Court.—P. 503, para. 732.

Changes in the law.—P. 503, para. 733.

Preliminary inquiry.—P. 504, para. 734; P. 505, para. 735.

Commitment to High Court sessions.—P. 505, para. 736.

71. Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.

Criminal liability after discharge or composition.

¹ The words "by the Court" were repealed by the Repealing Act, 1927 (12 of 1927).

² This section was substituted by s. 11 of the Insolvency (Amendment) Act, 1926 (9 of 1926) as amended by s. 3 and Sch. II of the Repealing and Amending Act, 1927 (10 of 1927).

Parallel enactments.—This section is new. See P.-t. I. A., s. 105.

Criminal liability after discharge or composition.—P. 507, para. 742.

**Prov. I. A.
ss. 71-73**

72. (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub-section (1), the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate; and may bind over any person to appear and give evidence on such trial.

Parallel enactments.—P.-t. I. A., s. 102; Prov. I. A., 1907, s. 53.

Offences by undischarged insolvent.—P. 505, para. 737.

Undischarged insolvent obtaining credit.—P. 506, para. 738.

Jurisdiction of magistrates.—P. 506, para. 739.

73. (1) Where a debtor is adjudged or re-adjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

- (a) being appointed or acting as a Magistrate;
- (b) being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached; and
- (c) being elected or sitting or voting as member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

- (a) the order of adjudication is annulled under section 35, or
- (b) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.

(3) The Court may grant or refuse such certificate as it thinks fit but any order of refusal shall be subject to appeal.

Parallel enactments.—This section is new. See P.-t. I. A., s. 103A.

Disqualification of insolvent.—P. 190, para. 274.

Insolvency caused by misfortune without misconduct.—P. 190, para. 275.

PART V.

Summary Administration.

**Prov. I. A.
ss. 74, 75**

74. When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise that the property of the debtor is not likely to exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications, namely:—

- (i) unless the Court otherwise directs, no notice required under this Act shall be published in the local official Gazette ;
- (ii) on the admission of a petition by debtor, the property of the debtor shall vest in the Court as a receiver ;
- (iii) at the hearing of the petition, the Court shall inquire into the debts and assets of the debtor and determine the same by order in writing, and it shall not be necessary to frame a schedule under the provisions of section 33 ;
- (iv) the property of the debtor shall be realised with all reasonable despatch and, thereafter, when practicable, distributed in a dividend ;
- (v) the debtor shall apply for his discharge within six months from the date of adjudication ; and
- (vi) such other modifications as may be prescribed with the view of saving expense and simplifying procedure :

Provided that the Court may at any time direct that the ordinary procedure provided for in this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly.

Parallel enactments.—P.-t. I. A., s. 106 ; Prov. I. A., 1907, s. 48.

Summary administration in small insolvencies.—P. 509, para. 743.

PART VI.

Appeals.

75. (1) The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, may appeal to the District Court, and the order of the District Court upon such appeal shall be final :

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit :

Provided further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908.

**Prov. I. A.
ss. 75, 76**

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court.

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

(4) The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days respectively.

Parallel enactments.—P.-t. I. A., s. 8 (2) (b); Prov. I. A., 1907, s. 46.

Appeal from orders of Court.—P. 540, para. 812.

Appeal to District Court and High Court.—P. 541, para. 813.

Changes in the law.—P. 542, para. 814.

Court subordinate to a District Court.—P. 542, para. 815.

Who may apply.—P. 543, para. 816.

Person aggrieved.—P. 543, para. 817.

The debtor.—P. 544, para. 818.

Creditor.—P. 545, para. 819.

Receiver.—P. 551, para. 820.

Any other person aggrieved.—P. 551, para. 821.

Questions of title, priority, etc., under sec. 4.—P. 551, para. 822.

Value of property for purposes of appeal.—P. 553, para. 823.

Appeal as of right from original order of District Court.—P. 553, para. 824.

Appeal with leave from original orders of District Court.—P. 554, para. 825.

Parties to appeal.—P. 557, para. 826.

Appeal to wrong Court.—P. 557, para. 827.

Appeal to Privy Council.—P. 557, para. 828.

Abatement of appeal.—P. 557, para. 829.

Procedure in appeal.—P. 557, para. 830.

Limitation.—P. 558, para. 831.

Revision.—P. 559, para. 832.

Review.—P. 560, para. 833.

Appeal from orders of Official Receiver.—P. 563, para. 844.

PART VII.

Miscellaneous.

76. The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall, subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had.

Costs.

Parallel enactments.—P.-t. I. A., s. 90 (2); Prov. I. A., 1907, s. 49.

Costs.—P. 568, paras. 848-851.

Prov. I. A.
ss. 77-79

77. All Courts having jurisdiction in insolvency and the officers of such Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Courts to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions.

Courts to be auxiliary to each other.

Parallel enactments.—P.-t. I. A., s. 126; Prov. I. A., 1907, s. 50.

Courts to be auxiliary to each other.—Pp. 58-61, paras. 80 and 81.

Orders in aid.—Pp. 60-61, para. 81.

78. (1) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree.

Limitation.

(2) Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded :

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act.

[This section is new.]

Limitation.—P. 558, para. 831.

Limitation as to appeals and applications.—P. 565, para. 846.

Limitation as to suits.—P. 180, para. 257, p. 566, para. 847.

Acknowledgment of debt in petition or schedule.—P. 182, para. 257.

Proof of debt and limitation.—P. 219, para. 328.

79. (1) The High Court may, with the previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor-General in Council, and, in the case of any other High Court, of the Local Government, make rules for carrying into effect the provisions of this Act.

Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide—

(a) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers, and the costs of such audit,

- (b) for meetings of creditors,
- (c) for the procedure to be followed where the debtor is a firm, ¹ *
- (d) for the procedure to be followed in the case of estates to be administered in a summary manner, ² [and
- (e) for any matter which is to be or may be prescribed.]

(3) All rules made under this section shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall on such publication, have effect as if enacted in this Act.

Parallel enactments.—P.-t. I.A., ss. 112, 113; Prov. I. A., 1907, s. 51.

Sub-sec. (1).—P. 570, para. 852.

Sub-sec. (2) (a).—Calcutta Rules 12—16; Madras Rules, XI, XVI, XVIII; Bombay Rules XII—XX; Allahabad Rules 12—19.

Sub-sec. (2) (c).—Calcutta Rules 19—27; Allahabad Rules 20—30; Bombay Rule XXVIII.

Sub-sec. (2) (d).—Calcutta Rule 30; Madras Rule XXIII; Bombay Rule XXV; Allahabad Rule 34.

Sub-sec. (2) (e).—*As to adjudication*—Calcutta Rule 6; Madras Rule XXI (1) & (9); Bombay Rule XXIV (1); Allahabad Rule 6.

—*As to annulment of adjudication*.—Calcutta Rule 6; Allahabad Rule 6.

—*As to composition*.—Calcutta Rule 16; Madras Rule X; Bombay Rule XI; Allahabad Rule 19.

—*As to discharge*.—Calcutta Rule 9; Madras Rules XX and XXI; Bombay Rules XXIII and XXIV; Allahabad Rule XXIX.

—*As to dividends*.—Calcutta Rule 29; Madras Rule XIX; Bombay Rules XXI and XXII; Allahabad Rule 33.

—*As to insolvency petitions*.—Calcutta Rule 2; Madras Rules IV to VIII; Bombay Rules IV to VII.

—*As to proof of debts*.—Calcutta Rules 17—18; Madras Rule VIII; Bombay Rules VIII and IX; Allahabad Rules 20—21.

80. (1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court,

Delegation of powers
to Official Receiver.

have all or any of the following powers, namely :—

3 * *

(b) to frame schedules and to admit or reject proofs of creditors ;

3 * *

3 * *

¹ The word “and” was omitted by s. 6 of the Provincial Insolvency (Amendment) Act, 1926 (39 of 1926).

² The word “and” and clause (e) were inserted by s. 6 of the Provincial Insolvency (Amendment) Act, 1926 (39 of 1926).

³ Clauses (a), (c) and (d) were omitted by s. 7 of the Provincial Insolvency (Amendment) Act, 1926 (39 of 1926).

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ss. 80-83

- (e) to make interim orders in any case of urgency ; and
- (f) to hear and determine any unopposed or *ex parte* application.

(2) Subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court.

Parallel enactments.—Prov. I. A., 1907, s. 52 ; cf. P.-t. I. A., s. 6.

Powers which may be delegated.—P. 522, para. 772.

Appeal from orders of Official Receiver.—P. 563, para. 844.

81. Any Local Government,¹ * * * may, by notification in the local official Gazette, declare that any of the provisions of this Act specified in Schedule II shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under this Act in any part of the territories administered by such Local Government.

Power of Local Government to bar application of certain provisions to certain Courts.

Parallel enactments.—Prov. I. A., 1907, s. 54.

See commentary under sec. 3 above

82. Nothing in this Act shall—

Savings. (a) Affect the Presidency-towns Insolvency Act, 1909,

2 * * *

(b) apply to cases to which Chapter IV of the Dekkhan Agriculturists Relief Act, 1879, is applicable.

3 * * *

Parallel enactments.—Prov. I. A., 1907, s. 55.

83. 3 * * *

Repeals.

(2) Where in any enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (of Insolvent Judgment-debtors) of the Code of Civil Procedure, 1877⁴, or of the Code of Civil Procedure, 1882⁴, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.

Parallel enactments.—Prov. I. A., 1907, s. 56.

¹ The words " with the previous sanction of the Governor General in Council " were omitted by s. 2 and sch. I of the Devolution Act, 1920 (38 of 1920), *infra*.

² The words " or section 8 of the Lower Burma Court Act, 1900 " were repealed by Act 8 of 1930.

³ Sub-section (1) was repealed by the Repealing and Amending Act, 1927 (12 of 1927).

⁴ See now the Code of Civil Procedure, 1908 (5 of 1908).

SCHEDULE I.

**Schedules
I, II**

[See section 75 (2).]

*Decisions and Orders from which an appeal lies to the High Court
under section 75 (2).*

Sections.	Nature of decision or order.
4	Decision of questions of title, priority, etc., arising in Insolvency.
25	Order dismissing a petition.
26	Order awarding compensation.
27	Order of adjudication.
33	Orders regarding entries in the schedule.
35	Order annulling adjudication.
37	Order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication.
41	Order on application for discharge.
50	Order disallowing or reducing entries in the schedule.
53	Order annulling a voluntary transfer.
54	Decision that a transfer of property is a preference in favour of a creditor.
1	* * *

SCHEDULE II.

[See section 81.]

*Provisions of the Act application of which may be barred by
Local Governments.*

Provision of the Act.	Subject.
Section.	
26	Award of compensation.
28, sub-sec. (3)	Reputed property of an insolvent.
34	Debts provable under the Act.
38	} Compositions and schemes of arrangement.
39	
40	

¹ The entry relating to section 69 was repealed by the Repealing Act, 1927 (12 of 1927).

**Schedules
II, III****SCHEDULE II—(contd.)***[See section 81]—(contd.)**Provisions of the Act application of which may be barred by
Local Governments.—(contd.)*

Provision of the Act.	Subject.
Section.	
42, sub-sections (1) and (2)	Obligation to refuse absolute discharge.
45	} Method of proof of debts
46	
47	
48	
49	
50	
51	} Effect of insolvency on antecedent transactions.
52	
53	
54	
55	
61, [except cl. (a) of sub-section (1) and sub-section (4)].	Priority of debts.
62	} Dividends.
63	
64	
65	
66	Management by and allowance to insolvent.
72	Penalty for obtaining of credit by undischarged insolvent.

SCHEDULE III.*[Enactments Repealed] Repealed by the Repealing Act, 1927 (12 of 1927).*

**RULES UNDER
PROVINCIAL INSOLVENCY ACT,
1920.
CALCUTTA.**

**Rules—Prov. I. A.
Calcutta.**

1. The following rules may be cited as "The Provincial Insolvency Rules." The forms prescribed by these rules, with such variations as circumstances may require, shall be used for the matters to which they severally relate.

(The forms are produced as Civil Process Forms No. 137 to 150 in Volume II.)

2. Every insolvency petition shall be entered in the Register of Insolvency Jurisdiction, and shall be given a serial number in that Register and all subsequent proceedings in the same matter shall bear the same number.

3. All Insolvency proceedings may be inspected at such times, and subject to such restrictions as the District Judge may prescribe, by the Receiver, the debtor, and any creditor who proved, or any legal representative on their behalf.

Notices.

4. Whenever publication of any notice or other matter is required by the Act or these Rules to be made in an official Gazette, a memorandum referring to and giving the date on which such advertisement appeared shall be filed with the record and noted in the order-sheet.

5. Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall be published in the local official Gazette and advertised in such newspapers as the Court may direct. A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition. The same procedure shall be followed in respect of notices of the date for the consideration of a proposal for composition or scheme of arrangement under sec. 38 (1).

6. Notice of an order of adjudication under section 30 may, in addition to the publication in the local official Gazette required by the Act, be published in such newspapers as the Court may direct. When the debtor is a Government servant, a copy of the order shall be sent to the head of the office in which he is employed. The same procedure shall be followed in regard to notices of orders annulling an adjudication under section 37 (2).

7. The notice to be given by the Court under section 50 shall be served on the creditor or his pleader, or shall be sent through the post by registered letter.

8. The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons, whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

9. Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official Gazette and in such newspapers as the Judge may direct, and copies shall be sent by registered post to all creditors whether they have proved or not.

10. A certificate of an officer of the Court or of the Official Receiver, or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the Post Office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

Rules—Prov. I. A. Calcutta.

11. In addition to the prescribed methods of publication, any notice may be published otherwise in such manner as the Court may direct, for instance by affixing copies in the Court-house or by beat of drum in the village in which the insolvent resides.

Receivers.

12. Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court should be served on the debtor, and forwarded to the person appointed.

13. (1) A Court when fixing the remuneration of a Receiver should, as a rule, direct it to be in the nature of a commission or percentage of which one part should be payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors.

14. The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court, and shall be paid out of the estate.

15. Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's Accounts (or any part thereof) relating to the estate, as shown by the cash book up-to-date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies.

16. In any case in which the debtor proposes a composition or scheme under section 38, the Receiver shall give seven days' notice to the debtor and to every creditor of the time and place appointed for such meeting. Such notices shall be served by registered post.

Proof of Debts.

17. A creditor's proofs should be in Civil Process Form No. 146 in Volume II, with such variations, as circumstances may require.

18. In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other persons on behalf of all such creditors. Such proof should be in Civil Process Form No. 147 in Volume II.

Procedure where the Debtor is a Firm.

19. Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, *e.g.*, "Brown & Co. by James Green, a partner in the said firm."

20. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

21. The provision of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

**Rules—Prov. I. A.
Calcutta.**

22. Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

23. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

24. In cases of partnership the debtors shall submit a schedule of his separate affairs.

25. The joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

26. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

27. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Sale of Immovable Property of Insolvent.

28. If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sells any immovable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost, and shall be signed by the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser.

Dividends.

29. The amount of the dividend may, at the request and risk of a creditor, be transmitted to him by post.

Summary Administration.

30. When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely:—

- (i) There shall be no advertisement of any proceedings in the Local Official Gazette or in any newspaper.
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case."
- (iii) The notice of the hearing of the petition to the creditors shall be in Civil Process Form No. 150 in Volume II.

Rules—Prov. I. A. Calcutta.

- (iv) The Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will often not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Costs.

31. All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the reasonable costs of the petitioning creditor shall be payable out of the estate.

32. No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate, if the Court refuses to approve the composition or scheme.

II.—*Cancel* Civil Process Forms Nos. 137-150 at pages 417 to 426, Volume II, of the Court's General Rules and Circular Orders, Civil, and *substitute* therefor the following :—

CIVIL PROCESS NO. 137.

DEBTOR'S PETITION.

[Section 13 of the Provincial Insolvency Act, V of 1920.]

District

In the Court of the District Judge at

Petitioner.

I (a)

(a) Insert name and address and description of debtor.

(b) State name of Court and particulars of decrees in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property.

(c) State whether, and how any of the debts are secured.

ordinarily residing at (or "carrying on business at," "or personally working for gain at," or "in custody at") in consequence of the order of (b) being unable to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of all pecuniary claims against me is Rs. (c) as set out in detail in Schedule A annexed hereunto, which contains the names and residences of all my creditors so far as they are known to, or can be ascertained by me. The amount and particulars of all my property are set out in Schedule B annexed hereunto together with a specification of all my property, not consisting of money, and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree.

I have not on any previous occasion filed a petition to be adjudged an insolvent or I set out in Schedule C particulars (d) relating to my previous petition to be adjudged an insolvent.

(d) The particulars required are—

(i) Where a petition has been dismissed, reasons for such dismissal.

(ii) Where a debtor has previously been adjudged an insolvent concise particulars of the insolvency including a statement whether any previous adjudication has been annulled and, if so, the grounds therefor.

Verification clause as in plaints.

Signature.

**Rules—Prov. I. A.
Calcutta.**

CIVIL PROCESS NO. 141.

ORDER ANNULLING ADJUDICATION.

[Section 35 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at
Insolvency Application No.

of 19 .

Applicant.

On the application of R. S., of , and on reading
and hearing , it is ordered that the order of adjudication, dated
against A. B. of , be and the same is hereby
annulled.

Dated this day of 19 .

CIVIL PROCESS NO. 142.

**NOTICE TO CREDITORS OF THE DATE OF CONSIDERATION OF A COMPOSITION OR
SCHEME OF ARRANGEMENT.**

[Section 38 (1) of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at
Insolvency Application No.

of 19 .

Applicant.

Take notice that the Court has fixed the day of
19 , for the consideration of a composition (or scheme of arrangement) submitted by
A. B., the debtor in the above insolvency petition. No creditor who has not proved his
debt before the aforesaid date will be permitted to vote on the consideration of the above
matter. If you desire to be represented at abovementioned hearing you should be present
in person or by duly instructed pleader with your proofs.

Judge.

On the reverse of the form.

Date of filing process	
Date of making over process to Nazir	
Date on which made over to the process-server	
Date of return by process-server after service	
Date of return by Nazir to Court	

CIVIL PROCESS NO. 143.

**LIST OF CREDITORS FOR USE AT MEETING HELD FOR CONSIDERATION OF
COMPOSITION OF SCHEME.**

[Section 38 (2) of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

In the matter of Insolvency Application No.

of 19 .

Applicant.

**Rules—Prov. I. A.
Calcutta,**

Meeting held at this day of 19 .

No.	Name of all creditors whose proofs have been admitted.	Here state as to each creditor whether he voted and, if so, whether personally or by pleader.	Amount of assets.	Amount of admitted proof.
		Total ..		

Required number of Majority.....

Required value.....Rs.

CIVIL PROCESS NO. 144.

NOTICE TO CREDITORS OF APPLICATION FOR DISCHARGE.

[Section 41 (1) of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

Insolvency case No.

of 19 .

Applicant.

Take notice that the abovenamed insolvent has applied at the Court for his discharge, and that the Court has fixed the day of 19 at o'clock for hearing the application.

Dated this day of 19 .

Note.— On the back of this notice the provisions of section 42 (1), Act V of 1920, should be printed.

Form on the reverse as in C. P. Form No. 1.

CIVIL PROCESS NO. 145.

ORDER OF DISCHARGE SUBJECT TO CONDITION AS TO EARNINGS,
AFTER-ACQUIRED PROPERTY, AND INCOME.

[Section 41 (2) (a), (b) or (c) of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

Insolvency case No.

of 19 .

Applicant.

On the application of , adjudged insolvent on the day of 19 , and upon taking into consideration the report of the Official Receiver (or Receiver) as to the insolvent's conduct and affairs, and hearing A. B. and C. D. creditors :—

It is ordered that the insolvent (a) be discharged forthwith ; or (b) be discharged on the , or (c) be discharged subject to the following conditions as to his future earnings, after-acquired property, and income :—

After setting aside out of the insolvent's earning, after-acquired property, and income, the yearly sum of Rs. for the support of himself and his family, the insolvent shall pay the surplus, if any (or such portion of such surplus as the Court may determine) of such earnings, after-acquired property, and income to the Court or Official Receiver (or Receiver) for distribution among the creditors in the insolvency. An account shall on the first day of January in every year, or within fourteen days thereafter, be

Rules—Prov. I. A.

Calcutta. filed in these proceedings by the insolvent, setting forth a statement of his receipts from earnings, after-acquired property, and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or Receiver) within fourteen days of the filing of the said account.

Dated this

day of

19

CIVIL PROCESS NO. 146.**PROOF OF DEBT: GENERAL FORM.****[Section 49 of the Provincial Insolvency Act, V of 1920.]**

Insolvency Application No. _____ of _____ 19 _____ Applicant.
 (a) Here insert number (_____)
 given in the notice. In the matter of _____ No. (a) of 19 _____
 I, _____ of (b), _____ make oath and say (or solemnly
 (b) Address in full. _____ and sincerely affirm and declare).
 1. That the said _____ ^{was} at the date of the petition, viz., the
 _____ were _____ day of _____ 19 _____ and still ⁱⁿ justly and truly indebted to me in the sum
 of Rs. _____ a. _____ p. _____ for (c) _____ as shown by the
 _____ account endorsed hereon (or the following account),
 (c) State consideration and _____ } viz., for which sum or any part thereof I say that I have
 specify the vouchers (if any) } not, nor hath _____ or any person by
 in support of the claim. } order to my knowledge or belief
 _____ for _____ use had or received
 (d) Here details of _____ } any manner of satisfaction or security whatsoever save
 securities bills or the like. } and except the following (d).
 Admitted to vote for Rs. _____ Sworn at _____ Deponent's
 Judge or Official Receiver. } this _____ day of _____ Signature.
 _____ before me { _____ Commissioner.

CIVIL PROCESS NO. 147.**PROOF OF DEBT OF WORKMEN.****[Section 49 of the Provincial Insolvency Act, V of 1920.]**

In the Court of the District Judge at _____
 Insolvency Application No. _____ of 19 _____
 I (a) of (b) make oath and say:— (or solemnly and sincerely affirm and declare).
 1. That (c) ^{was} at the date of the adjudication, viz.,
 _____ were _____ the day of _____ 19 _____ and still ^{am} justly
 _____ are _____ and truly indebted to the several persons whose names, addresses
 and description appear in the schedule endorsed hereon in sums
 severally set against their names in the sixth column of such
 schedule for wages due to them respectively as workmen or
 others in (d) _____ in respect of services rendered
 by them respectively to (e) _____ during such periods
 before the date of the receiving order as are set out against their
 respective names in the fifth column of such schedule, for which
 said sums or any part thereof, I say that they have not, nor hath
 any of them had or received any manner of satisfaction or
 security whatsoever.
 (a) Fill in full name, _____
 address and occupation _____
 of deponent.
 (b) The abovenamed _____
 debtor or the foreman _____
 of the abovenamed _____
 debtor or on behalf of _____
 the workmen and others _____
 employed by the _____
 abovenamed debtor.
 (c) "I" or "the _____
 said".
 (d) "My employ" _____
 or "the employ of the _____
 abovenamed debtor."
 (e) "Me" or "the _____
 abovenamed debtor."
 Judge or Official Receiver. } this _____ Sworn at _____ Deponent's
 Admitted to vote for Rs. _____ day of _____ Signature.
 _____ before me { _____ Commissioner.

CIVIL PROCESS NO. 148.

ORDER APPOINTING A RECEIVER.

[Section 56 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

In the matter of _____ an Insolvent.

No. _____ of _____ 19 .

Whereas A. B., _____ was adjudicated an insolvent by order of this Court, dated _____, and it appears to the Court that the appointment of a Receiver for the property of the Insolvent is necessary:— It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and A. B. _____ of [or the Official Receiver] is hereby constituted Receiver of the property of the said insolvent. And it is further ordered that the said Receiver (not being the Official Receiver) do give security to the extent of _____ and that his remuneration be fixed at _____

Dated _____

Judge.

CIVIL PROCESS NO. 149.

**NOTICE TO PERSONS CLAIMING TO BE CREDITORS OF INTENTION TO
DECLARE FINAL DIVIDEND.**

[Section 64 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

In the matter of _____ Insolvency Application No. _____ of 19 _____ Applicant.

Take notice that a final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the Court on or before the _____ day of _____ 19 , or such later day as the Court may fix, your claim will be expunged, and I shall proceed to make a final dividend without regard to such claim _____ Dated this _____ day of _____ 19 .
To X. Y. _____ Receiver, [Address.]

Form on the reverse as in C. P. Form No. 1.

CIVIL PROCESS NO. 150.

SUMMARY ADMINISTRATION NOTICE TO CREDITORS.

[Section 74 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

Insolvency Application No. _____ of 19 .

Applicant.

Take notice that on the _____ day of _____ 19 , the abovenamed debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the _____ day of _____ 19 , the Court being satisfied that the property of the debtor is not likely to exceed Rs. 500, directed that the debtor's estate be administered in a summary manner and appointed the _____ day of _____ 19 , for the further hearing of the said petition and examination of the said debtor.

Also take notice that the Court may on the aforesaid date then and there proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on that date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of the Court, this the _____ day of _____ 19 .

Judge.

RULES UNDER
PROVINCIAL INSOLVENCY ACT, 1920.
MADRAS.

Rules—Prov. I. A.
Madras.

By virtue of the provisions of section 79 of the Provincial Insolvency Act, 1920, and of all other powers thereunto enabling, and with the previous sanction of His Excellency the Governor in Council, the High Court of Judicature at Madras has made the following rules for carrying into effect the provisions of the said Act :—

I. These Rules may be called “ The Madras Provincial Insolvency Rules, 1922 ”, and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Madras. They shall come into force on the first day of May 1922 and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II. The forms mentioned in these Rules are the forms in the Appendix hereto and shall be used with such variations as the circumstances may require.

III. (1) In these Rules, unless there is anything repugnant in the subject or context, “ the Act ” means the Provincial Insolvency Act, 1920 ; “ the Court ” includes a Receiver when exercising the powers of the Court in accordance with section 80 of the Act ;

“ Receiver ” means a Receiver appointed by the Court under section 56 (1) of the Act ;

“ Interim Receiver ” means a Receiver appointed by the Court under section 20 of the Act ;

“ proved debt ” means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided all words and expressions used in these Rules shall have the same meaning as those assigned to them in the Act.

IV. (1) Every petition, application, affidavit or order in any proceeding under Cause title and the Act or under these rules shall be headed by a cause-title in number. Form No. 1.

(2) When an insolvency petition is admitted, the chief ministerial officer of the Court shall assign a distinctive serial number to the petition and all subsequent proceedings on the petition shall bear that number.

V. (1) When an insolvency petition presented by a creditor is admitted, the creditor shall within seven days thereafter furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors and the chief ministerial Officer of the Court shall sign the copy or copies if on examination he finds them to be correct.

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served.

VI. The particulars to be given under section 13 (1) of the Act shall be in Form No. 2.

VII. If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in the manner provided for the service of summons.

VIII. (1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No. 3 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence.

Proof of debts.

(2) The affidavit may be made by the creditor or by some person authorized by him, provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge.

(3) As soon as may be after proof of any debt is tendered, the Court shall by order in writing admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection.

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order.

IX. As soon as the schedule of creditors has been framed a copy thereof shall, if a Receiver or *Interim* Receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the Receiver or *Interim* Receiver.

Schedule of creditors.

X. (1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved.

Consideration of compositions and schemes of arrangement.

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court.

XI. (1) Every appointment of a Receiver or *Interim* Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor and forwarded to the person appointed.

Appointment of, and security from, Receiver and *Interim* Receiver.

(2) Every Receiver or *Interim* Receiver other than an Official Receiver shall be required to give such security as the Court thinks fit.

(3) The Court shall not require an Official Receiver to give security.

(4) In cases where the Official Receiver is empowered to make orders of adjudication, he shall send a copy of every order of adjudication made by him to the Court in which the proceedings are pending and may apply that he may be appointed Receiver for the property of the insolvent.

(5) The Court may thereupon appoint the Official Receiver to be receiver for the property of the insolvent and, unless it sees fit to do so, it shall not be necessary to give notice of the application to any person.

Provided that any party to the proceedings may apply to the Court, upon notice to the Official Receiver and the insolvent, that the appointment of the Official Receiver may be set aside or that a special receiver may be appointed in his place.

XII. (1) The Court may remove or discharge any Receiver or *Interim* Receiver other than an Official Receiver, and any Receiver, or *Interim* Receiver so removed or discharged shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to

Removal or discharge of Receiver or *Interim* Receiver.

Rules—Prov. I. A.**Madras,**

the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the Receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any book, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct.

Receiver or *Interim*
Receiver an officer of
the Court.

XIII. Every Receiver or *Interim* Receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court.

Applications by
Receiver or *Interim*
Receiver.

XIV. (1) Every application to the Court made by a Receiver or an *Interim* Receiver shall be in writing.

(2) The Court may order that notice of any application by the Receiver or *Interim* Receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved.

XV. (1) The remuneration of Receivers or *Interim* Receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five *per centum* of the amount of the dividends.

Remuneration of
Receivers.

(2) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 38 (7) of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof.

XVI. (1) Unless the Court otherwise directs the Receiver or *Interim* Receiver shall as soon as may be after his appointment, and in any case before the

Receiver's report.

hearing of the debtor's application for discharge draw up a report upon the cause of the debtor's insolvency, the conduct of the debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with such proceedings, and in particular such report shall state (a) whether the value of the debtor's assets is less than half his unsecured liabilities and, if so, whether that fact is due to circumstances for which the debtor cannot justly be held responsible, (b) whether the debtor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency, (c) whether the debtor has continued to trade after knowing himself to be insolvent, (d) whether the debtor has contracted any debt provable under the Act without having at the time of contracting it any reasonable or probable ground of expectation that he would be able to pay it, (e) whether the debtor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities, (f) whether the debtor has brought on, or contributed to, his insolvency by rash and hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs, (g) whether the debtor has within three months preceding the date of the presentation of the petition when unable to pay his debts as they became due given an undue preference to any of his creditors, (h) whether the debtor has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditor, and (i) whether the debtor has concealed or removed his property or part of it or has been guilty of any other fraud or fraudulent breach of trust.

(2) If the debtor submits a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

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Madras.**

XVII. Unless the Court otherwise directs, the debtor shall furnish the Receiver or *Interim* Receiver or, if a Receiver or *Interim* Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtors or on his account and his income and the source thereof for such period as the Receiver or *Interim* Receiver or, if a Receiver or *Interim* Receiver has not been appointed, the Court may direct, provided that the Receiver or *Interim* Receiver shall not, without the previous sanction of the Court, direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition.

XVIII. (1) The Receiver or *Interim* Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) The account of Official Receivers shall be audited annually by the Accountant-General.

(3) The cost of such audit, calculated at 12 annas per Rupee one hundred on the amount realized since the last audit of the estate concerned, shall be paid by the Official Receiver from such amount and, in case a distribution thereof to creditors it ordered in any year before the audit has taken place, shall be reserved for such payment from the amount otherwise available for distribution.

XIX (1) No dividend shall be distributed by a Receiver without the previous sanction of the Court.

(2) Notice in Form No. 8 or Form No. 9, as may be appropriate, that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver, by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution.

(3) The amount of any dividend due to a creditor may at his request be transmitted to him by postal money order at his risk and expense and, if the amount does not exceed Rs. 5, shall be so transmitted, unless he appears to claim it in person or by duly authorized agent before the Receiver or, if there is no Receiver, before the Court within two months from the date of the order sanctioning the distribution of the dividend.

(4) An order shall not be made under section 65 of the Act without giving the Receiver opportunity to show cause why the order should not be made.

XX. (1) An application for discharge shall not be heard until after the schedule of creditors has been framed.

(2) Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if any) not less than seven days before the date fixed for the hearing a notice stating the grounds of his opposition to the discharge.

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor; and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice.

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the

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debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor, in person or by pleader, who has served the prescribed notice.

XXI. (1) The notices to be given under sections 19 (2), 30, 37 (2), 38 (1) and 41 (1) of the Act shall be published in the *Port St. George Gazette* in English, in the District Gazette in English and in the language of the Court and in such other manner, if any, as the Court may direct, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

Notices.

(2) The notices to be given under sections 19 (2), 38 (1), and 41 (1) of the Act shall be published and affixed in the manner provided in paragraph (1) of this rule not less than fourteen days before the date fixed for the hearing of the application, the consideration of the proposal, or the hearing of the application for discharge as the case may be.

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than fourteen days before the said date.

(4) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors who have proved their debts and may, if the Court so directs, be served on any or all such creditors by registered post.

(5) Notice of the date fixed for the consideration of a proposal under section 38 (1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than fourteen days before the said date.

(6) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the schedule of creditors not less than fourteen days before the said date.

(7) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims.

(8) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

(9) The notice of an order of adjudication to be published under section 30 of the Act shall contain a statement that creditors should prove their claims as soon as possible and that claim may be proved by delivering or sending by registered post to the Court or Official Receiver, as the case may be, an affidavit in Form No. 3.

XXII. (1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them ; but when an order of adjudication has been made, the costs of the petitioning creditor including the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the petitioning creditor is required to pay shall be taxed and be payable out of the estate.

Costs.

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition and the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the debtor is required to pay.

**Rules—Prov. I. A.
Madras.**

(3) The cost of the publication in the Gazette of—

(a) An order fixing the date for the hearing of an insolvency petition under section 19 (2) shall, when the petition is by the creditor, be paid by the creditor, and, when the petition is by debtor, be paid out of the sum deposited in Court by the debtor under rule XXII (2).

(b) Notice of a proposal for a composition under section 38 (1) and notice of an application for discharge under section 41 (1) shall be paid by the debtor.

(4) The publication in the Gazette of—

(a) Notice of adjudication under section 30,

(b) Notice to creditors whose claims have been notified but not proved under section 64,

(c) Notice of an order annulling an adjudication under section 31, shall be free of charge.

(5) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme.

(6) If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate, the Receiver or *Interim* Receiver or Official Receiver, as the case may be, may call upon the creditors or any of them to advance the necessary funds, or to indemnify him against the cost of such proceedings. Any assets realized by such proceedings shall be applied, in the first place, towards the repayment of such advances, with interest thereon at 6 per cent. per annum.

XXIII. If the Court makes an order under section 74 of the Act that the debtor's Summary administration estate be administered in a summary manner—

(a) the petition and all subsequent proceedings shall be endorsed "Summary Case";

(b) the Receiver or *Interim* Receiver shall not carry on the business of the debtor under clause (c) of section 59 of the Act, nor institute any suit under clause (d) of the said section, nor accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time under clause (f), nor mortgage nor pledge any part of the property of the debtor under clause (g).

XXIV. All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver or *Interim* Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

XXV. All Courts and Official Receivers shall maintain registers of (1) insolvency petitions received, (2) insolvency petitions disposed of, and (3) proceedings in insolvency subsequent to orders of adjudication in the Forms Nos. 4, 5 and 6 in the appendix to these rules. They shall also submit to the High Court on the 15th day after the close of each quarter a return of all proceedings in insolvency in Form No. 7.

XXVI. In addition to the registers prescribed in rule XXV, Official Receivers shall maintain (i) a dividend register, (2) a register of assets and (3) a document register (inventory) in Forms Nos. 10, 11 and 12 appended to these rules.

XXVII. Expenditure incurred by an Official Receiver and his staff on journeys undertaken for the purpose of administration will be recoverable by the Official Receiver from the assets of the estate or estates concerned in accordance with the rules made by the High Court from time to time on that behalf.

Rules—Prov. I. A.**Madras.**

XXVIII. (1) When any petition, notice or other document is signed by a firm of creditors or debtors in the firm's name, the partner signing for Proceedings by or the firm shall add also his signature in the following manner, against a firm. "B and Co., by A. B., a partner in the said firm."

(2) Any petition or notice of which personal service is necessary shall be deemed to be duly served on all members of the firm, if it is served at the place of business of the firm in India upon any one of the partners or upon any person having at the time of service the control or management of the partnership business there.

(3) When the firm of debtors files an insolvency petition, the same shall contain the names in full of the individual partners, and, unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same.

(4) When a creditor files an insolvency petition against a firm, the same shall state the names of the individual partners so far as the same are known to the petitioner, and the debtors shall together with their schedule of affairs file an affidavit setting out the names in full of the individual partners.

(5) An order of adjudication shall be made against the partners individually.

(6) The debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs.

PROVINCIAL INSOLVENCY RULES,**BOMBAY.****Rules—Prov. L. A.
Bombay.**

No. 5730.—By virtue of the provisions of section 79 of the Provincial Insolvency Act (V of 1920), and of all other powers thereunto enabling, the High Court of Judicature at Bombay, has with the previous sanction of His Excellency the Governor in Council, and in supercession of the Bombay Provincial Insolvency Rules, 1909, made the following rules for carrying into effect the provisions of the said Act :—

I.—The rules may be called “The Bombay Provincial Insolvency Rules, 1924,” and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Bombay. They shall come into force on the 1st day of December, 1924, and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II.—The forms mentioned in these rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III.—(1) In these rules unless there is anything repugnant in the subject or context.—“the Act” means the Provincial Insolvency Act, V of 1920 ;

“the Court” includes a receiver when exercising the powers of the Court in accordance with section 80 of the Act ;

“receiver” means a receiver appointed by the Court under section 56 (1) of the Act, and (except where the context otherwise requires) includes an Official Receiver ;

“interim receiver” means receiver appointed by the Court under section 20 of the Act ;

“proved debt” means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided, all words and expressions used in these rules shall have the same meaning as those assigned to them in the Act.

Petitions.

IV.—(1) Every insolvency petition shall be entered in the Register of Insolvency Petitions to be maintained in Form No. 7 in all Courts exercising insolvency jurisdiction and shall be given a serial number in their register and all subsequent proceedings in the same matter shall bear the same number.

(2) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No. 1.

V.—(1) When an insolvency petition presented by a creditor is admitted, the creditor shall, within seven days thereafter, furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct.

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served. Such notice may, in the discretion of the Court, require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e) within such time not being less than ten days from date of service of notice as the Court shall determine.

VI.—A debtor's petition shall be in Form No. 2 and a creditor's petition shall be in Form No. 3.

Rules—Prov. I. A.**Bombay.**

VII.—If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that the notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in a manner provided for the service of summons.

Proof of Debts.

VIII. (1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No. 7 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence.

(2) The affidavit may be made by the creditor or by some person authorised by him, provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge.

(3) As soon as may be after proof of any debt is tendered, the Court shall, by order in writing, admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection.

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order.

IX.—In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other person on behalf of all such creditors. Such proof should be in Form No. 8.

Schedule of Creditors.

X.—As soon as the schedule of creditors has been framed, a copy thereof shall, if a receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the receiver, except in cases where the Official Receiver himself frames such schedule under section 80.

Scheme.

XI.—(1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal, and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved.

(2) At the meeting for the considerations of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal, and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court.

Receivers.

XII.—(1) Every receiver or *interim* receiver other than the Official Receiver shall be required to give such security as the Court thinks fit; provided that a Nazir, or Deputy Nazir, or other Government Officer who is appointed a receiver or *interim* receiver *ex-officio*, and who has already under the Public Accountant's Default Act XII of 1850, or otherwise, given security, that is still valid, for the due account of all monies which shall come into his possession or control by reason of his office shall not be required to give such security unless, owing to the extent of the assets likely to be realised, or for other special reasons, the Court thinks it desirable to do so.

**Rules—Prov. I. A.
Bombay.**

(2) The Court shall not require an Official Receiver to give security in each case in which he acts under section 57 (2); but he shall, previous to his admission, or within such further time as the Court may allow, give general security by entering into a recognizance with one more sufficient sureties in Form No. 16 or by depositing Government Securities, in such time as the High Court may fix in this behalf.

(3) Where a petition is referred to an Official Receiver for disposal in exercise of his powers under section 80, the Court ordinarily shall, when the debtor is the petitioner and may, when a creditor is the petitioner, at the same time appoint him an *interim* receiver under section 20, and confer on him all the powers conferable on a receiver under Order XL, rule (1) (d), of the Civil Procedure Code. Such Official Receiver, upon making an order of adjudication, shall at once apply to the Court for an order appointing him Receiver for the property of the insolvent under sections 56 and 57. The Official Receiver should at the same time submit a draft order in Form No. 6, with the necessary modifications, for signature and sealing.

XIII.—(1) The Court may remove or discharge any receiver other than an Official Receiver, and any receiver or *interim* receiver so removed or discharged, or any Official Receiver suspended or dismissed by the Local Government, shall unless the Court otherwise orders, deliver up any assets of the debtor in his hands and books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct.

XIV.—Every receiver or *interim* receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court.

XV.—(1) Every application to the Court made by a receiver or an *interim* receiver shall be in writing.

(2) The Court may order that notice of any application by the receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved.

XVI.—(1) The remuneration of receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of the dividends.

(2) When a Receiver realizes the security of a secured creditor the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors.

(3) If a receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 39 of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof.

XVII.—^aThe Receiver in making his report shall state whether in his opinion any of the facts mentioned in section 42, sub-clause (1), of the Act exist, and if the debtor makes a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

**Rules—Prov. I. A.
Bombay.**

XVIII.—If the Court directs, the debtor shall furnish the Receiver or, if a Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtor or on his account and his income and the source thereof for such period as the Receiver or, if a Receiver has not been appointed, the Court may direct: provided that the Receiver shall not, without the previous sanction of the Court direct the debtor to furnish accounts for more than two years before the date of the presentation of the in solvency petition.

XIX.—(1) The Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) Any creditor who has proved his debt, or the debtor, shall be entitled to obtain a copy of the Receiver's accounts (or any part thereof) relating to the estate on payment of the legal fees therefor.

XX.—The Receiver shall deposit all valuable securities for sale custody with the Nazir or, if so ordered by the Court in the Imperial Bank of India, and whenever a sum exceeding Rs. 500 shall stand to the credit of any one estate, the Receiver shall give notice thereof to the Court, and, unless it shall appear that a dividend is about to be immediately declared, he shall obtain the Court's order to invest the same in a Promissory Note of the Government of India or in Post Office Cash Certificates.

Dividends.

XXI.—No dividend shall be distributed by a Receiver without the previous sanction of the Court.

XXII.—The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post.

Discharge.

XXIII.—(1) An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report. The Receiver, if he is in a position to make it and has already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application.

(2) Every creditor who has proved shall be entitled in person or by Pleader to appear at the hearing and oppose the discharge: provided that he has served upon the insolvent and upon the Receiver (if any) not less than 7 days before the date fixed for the hearing a notice stating the ground of his opposition to the discharge.

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor; and a creditor who has served the prescribed notices, shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice.

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or, by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by Pleader, and any creditor, in person or by Pleader, who has served the prescribed notice.

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Bombay.**

(5) Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under section 27 shall be brought up for orders under section 43. If the Court has omitted to specify a period under section 27 (1) and the debtor has not already applied for discharge, the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor, and if on its expiry, the debtor has not applied accordingly, the case shall be brought up for orders under section 43.

Notices.

XXIV.—(1) The notices to be given under sections 30 and 37 (2) of the Act shall be published in the Bombay Government Gazette, in English, and, if the Court so directs in any suitable English or Vernacular newspaper and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notice to be given under sections 19 (2), 38 (1) and 41 (1) of the Act shall be published in any suitable English or Vernacular newspaper, and if the Court so directs, in the Bombay Government Gazette, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than 14 days before the said date.

(4) Notice of the date fixed for the consideration of a proposal under section 38 (1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than 14 days before the said date.

(5) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the Schedule of creditors not less than 14 days before the said date.

(6) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims.

(7) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors whose names appear in the Schedule of creditors and may, if the Court so directs, be served on any or all such creditors by registered post.

(8) The Court may instead of or in addition to forwarding a notice by registered post under the foregoing rules cause it to be served in the manner prescribed for the service of summons.

(9) In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court house or by beat of drum in the village in which the debtor resides.

(10) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

Summary Administration.

XXV. When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and rules shall, subject to and

Rules—Prov. I. A.

Bombay.

special direction of the Court and in addition to the modifications contained in section 74, be modified as follows, namely :

- (i) There shall be no advertisement of any proceedings in a local paper.
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case."
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No. 15.
- (iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will generally not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Sale of immovable property of debtor.

XXVI.—If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sells any immovable property of the debtor, the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall (subject to any modifications the Court thinks necessary) be signed by the Presiding Officer of the Court.

Costs.

XXVII.—(1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them ; but when an order of adjudication has been made, the costs of the petitioning creditors shall be taxed and be payable out of the estate.

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition.

(3) No costs incurred by a debtor of, or incidental to, an application to approve a composition or schemes shall be allowed out of the estate, if the Court refuses to approve the composition or scheme.

(4) Whenever a creditor presents an insolvency petition he shall deposit in Court the sum of Rs. 150 to cover expenses. Such deposits shall be paid out of the first available assets realised.

Procedure where the Debtor is a Firm.

XXVIII.—(1) Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, *e.g.*, "Brown & Co., by James Green, a partner in the said firm."

(2) Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

(3) The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

**Rules—Prov. I. A.
Bombay.**

(4) Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

(5) An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

(6) In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

(7) The joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

(8) Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the Joint Creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

(9) If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Inspection of Proceedings.

XXIX.—All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

Pleaders' Fees.

XXX.—The fees allowed to Pleaders as costs in any proceedings under the Act shall be such as are allowed under the rules of the Court for a miscellaneous proceeding.

**Rules—Prov. I. A.
Bombay.**

APPENDIX.

Form No. 1.

General Title.

In the Court of

Insolvency Petition No.

of 19 .

In the matter of

Ex parte (here insert "the debtor" or "A.B. a creditor" or "the Official Receiver" or "the Receiver").

Form No. 2.

Debtor's Petition.

(Title.)

I (a)

ordinarily residing at, (or "carrying on business at," or "personally working for gain at" or "in custody at ") in consequence of the order of (b)

(a) Insert name and address and description of debtor.

being unable to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of all pecuniary claims against me is Rs.

(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property.

(c) as set out in detail in Schedule A annexed hereunto, which contains the names and residences of all my creditors so far as they are known to, or can be ascertained by me. The amount and particulars of all my property and debts due to me are set out in Schedule B annexed hereunto together with specification of all my property, not consisting of money, and the place or places at which such property is to be found, and I hereby declare that I am willing to place all such property

(c) State whether and how any of the debts are secured.

at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree.

(d) I filed a petition to be adjudged an insolvent in the Court of on or about

and on such petition was adjudged an insolvent in respect of debts totalling approximately Rs.

(d) Strike out the whole of this clause if the debtor has not filed a previous petition to be adjudged an insolvent, and substitute a statement to that effect.

against which assets were realized to the extent of approximately Rs.

and a dividend (or "dividends") of in the rupee was (or "were") declared. I was granted an absolute order of discharge (or "I was refused an absolute order of discharge and my discharge was suspended for

"and/or" I was granted an order of discharge subject to the following conditions") on or about

This adjudication has been annulled on the following grounds (or "has not been annulled") (or for the above form "and on such petition" substitute) "and such petition was dismissed for the following reasons:—

(Signature.)

(Verification clause as in plaints.)

Schedule B referred to in Form No. 2.*Form of list of debtors to be annexed to the debtor's petition.***DEBTORS.**

No.	Name and residence of debtors.	Nature and consid- eration of the debt and the securities (if any) for the same.	When contracted.	Amount.	Good, bad or doubt- ful.	Witnesses with their residence and other evidence by which the debt may be proved.

N. B.—Where there have been mutual dealings and it is alleged that a claim by any party has been set-off, such party must be entered both as a creditor and debtor and the word 'Set-off' must be written under the amount.

**Rules—Prov. I. A.
Bombay**

**Form No. 3.
Creditor's Petition.**
(Title.)

I, C.D., of
& E.F., of (or We, C.D., of) hereby petition the Court that A.B. (a)
ordinarily residing at
(a) Insert name, (or "carrying on business at"
address and description. or "personally working for gain at"
) may be adjudged an insolvent and say :—

1. That the said A.B. is justly and truly indebted to me (or us in the aggregate)
in the sum of Rs. (set out amount of debt or debts, and the considera-
tion.)

2. That I (or we) do not, nor does any person on my (or our) behalf hold any
security on the said debtor's estate, or any part thereof, for the payment of the said
sum.

Or,

That I hold security for the payment of (or part of) the said sum (but that I will
give up such security for the benefit of the creditors of the said A.B. in the event of his
being adjudged insolvent) (or, and I estimate the value of such security at the sum of
Rs.).

Or,

That I, C.D., one of your petitioners, hold security for the payment of, etc.

That I, E.F., another of your petitioners, hold security for the payment of, etc.

3. That the said A.B. within 3 months before the date of the presentation of this
petition has committed the following act (or acts) of insolvency, namely,
(here set out the nature and date or dates of the act or acts of insolvency relied on).

(Signature.)

(Verification clause as in plaints).

Form No. 4.

Notice to creditors of the date of hearing of an insolvency petition—section 19.

(Title).

Whereas A.B. has applied to this Court, by a petition, dated of
19 to be declared an insolvent under the Provincial Insolvency Act (V of 1920),
and your name appears in the list of creditors filed by the aforesaid debtor, this is to give
you notice that the Court has fixed the day of 19 for the
hearing of the aforesaid petition and the examination of the debtor. If you desire to
be represented in the matter you should attend in person or by a duly instructed pleader.
The particulars of the debt alleged in the petition to be due to you, are as follows :—

Dated this day of 19 .

Judge,

Form No. 5.

Order of Adjudication—section 27.

(Title.)

Pursuant to a petition dated (here insert name, description and
address of debtor) and on reading and hearing
it is ordered that the debtor be and the said debtor is hereby adjudged insolvent.

Dated this day of 19 .

Judge,

**Rules—Prov. I. A.
Bombay.**

Form No. 6.

Order appointing a Receiver—section 56.

(Title.)

Whereas A.B. was adjudicated an insolvent by order of this Court,
dated , and it appears to the Court that the appointment of a receiver for the property of the insolvent is necessary :

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and R. S. of (or the Official Receiver) is hereby constituted receiver of the property of the said insolvent.

And it is further ordered that the said receiver (not being the Official Receiver) do give security to the extent of and that his remuneration be fixed at

If the receiver is a Government Officer who has given security that is still valid of the kind mentioned in the proviso to Rule XII (1), strike out this paragraph unless the Court specially directs him to give such security.

Dated this day of 19 .

Judge.

Form No. 7.

Proof of debts.

General Form—Section 49.

(Title).

In the matter of

(a) Here insert No. (a) of 19 .
number given in the notice.

(b) Address in full. I, of (b) make oath
and say (or solemnly and sincerely, affirm and declare :—

That the said , at the date of the petition, viz., the
day of 19 , and still justly and truly indebted to me
in the sum of Rs. as. p. , for (c) as shown by the account
endorsed hereon (or the following account), viz :—

(a) State consideration and specify the vouchers (if any) in support of the claim.

For which sum or any part thereof I say that I have not, nor hath any person by (d) order to my knowledge or belief for (d) use had or received any manner of satisfaction or security whatsoever save and except the following (e) :

(d) Here insert words "my" or "our" or "their" or "his" as the case may be.

(e) Here details of securities bills or the like.

Admitted to vote for Rs. { this Sworn at day before me. } Deponent's Signature.

Judge or Official Receiver.

(Signed) X. Y.

Designation.

Form No. 8.

Proof of debts of workmen.

(Title).

I (a) of (b) make oath and say, (or solemnly and sincerely affirm and declare:—
That (c) at the date of adjudication, viz.

(a) Fill in full name, address and occupation of deponent. the day of 19, and still justly and indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or others in (d) in respect of services rendered by them respectively to (e) during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not, not hath any of them had or received, any manner of satisfaction or security whatsoever.

(b) The abovenamed debtor or the foreman of the abovenamed debtor or on behalf of the workmen and others employed by the abovenamed debtor.

(c) "I" or "the said"

(d) "My employ" or "the employ of the abovenamed debtor."

(e) "Me" or "the abovenamed debtor."

Admitted to vote for Rs.	}	Sworn at	}	Deponent's
Judge or Official Receiver.		this day		Signature.
		before me.		

(Signed) X. Y.

Designation.

Form No. 9.

Notice to creditors of the date of consideration of a composition or scheme of arrangement—section 38.

(Title).

Take notice that the Court has fixed the day of 19 or the consideration of a composition (or scheme of arrangement) submitted by A. B., the debtor in the above insolvency petition. No creditor who has not proved his debt before the aforesaid date will be permitted to vote on the consideration of the above matter. If you desire to be represented at the abovementioned hearing you should be present in person or by a duly instructed pleader with your proofs.

Dated this day of 19 .

Judge.

Rules—Prov. I. A. Bombay.

Form under section 38 (2).

List of creditors for use at Meeting held for consideration of composition of scheme.

(Title).

Meeting held at this day of 19 .

No.	Names of all creditors whose proofs have been admitted.	Here state as to each creditor whether he voted, and, if so, whether personally or by pleader.	Amount of Assets.	Amount of admitted proof.
		Total ..		

Required number of Majority.....

Required value.....Rs.

Form No. 11.

Form of Notice under section 64. Notice to person claiming to be creditors of intention to declare final Dividend.

(Title).

Take notice that a final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the Court on or before the _____ day of _____ 19____ or such later day as the Court may fix, your claim will be expunged, and I shall proceed to make a final dividend without regard to such claim.

Dated this day of 19 .

G. H. Receiver,
(Address).

To X Y.

Form No. 12.

Order annulling Adjudication under section 37.

(Title).

On the application of R. S., of _____, and on reading
and having _____ it is ordered that the order of adjudication
dated _____ against A. B., of _____ be
and the same is hereby annulled.

Dated this day of 19 .

Judge.

**Rules—Prov. I. A.
Bombay.**

Form No. 13.

Notice to Creditors of Application for Discharge—section 41 (1).

(Title).

Take notice that the abovenamed insolvent has applied to the Court for his discharge and that the Court has fixed the day of 19 at o'clock for hearing the application.
Dated this day of 19 .

Judge.

Note.—On the back of this notice the provisions of section 42 (1), Act V of 1920, should be printed.

Form No. 14.

Order of Discharge subject to conditions as to earnings, after-acquired property and income.

Section 41 (2) (a), (b) or (c).

(Title).

On the application of , adjudged insolvent on the day of 19 , and upon taking into consideration the report of the Official Receiver (or receiver) as to the insolvent's conduct and affairs and hearing A. B. and C. D. creditors :

it is ordered that the Insolvent—

(a) be discharged forthwith ; or

(b) be discharged on the , or

(c) be discharged subject to the following conditions as to his future earnings after-acquired property and income :—

After setting aside out of the insolvent's earnings, after-acquired property, and income, the yearly sum of Rs. for the support of himself and his family, the insolvent shall pay the surplus, if any (or such portion of such surplus as the Court may determine), of such earning, after-acquired property, and income to the Court or Official Receiver (or receiver) for distribution among the creditors in the insolvency. An account shall, on the 1st day of January in every year or within 14 days thereafter, be filed in these proceedings, by the insolvent setting forth a statement of his receipts from earnings, after-acquired property, and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or receiver) within 14 days of the filing of the said account.

Dated this day of 19 .

Judge.

Form No. 15.

Summary Administration—section 74.

(Title).

Notice to Creditors.

Take notice that on the day of 19 , the abovenamed debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the day of 19 , the Court being satisfied that the property of the debtor is not likely to exceed Rs. 500, directed that the debtor's estate be administered in a summary manner and appointed the day of 19 , for the further hearing of the said petition and the examination of the said debtor,

Rules—Prov. I. A.**Bombay.**

Also take notice that the Court may, on the aforesaid date then and there, proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on the date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of the Court this day of
19 .

Judge.

Form No. 16.
Recognizance of the Official Receiver and sureties.

(Rule XIV).

The Judge of the District Court has approved of
and allowed this recognizance.

R. P. H. of, etc., W. B. of, etc., and T. P. of, etc., in the District Court of
personally appearing, do acknowledge themselves, and each of them doth acknowledge
himself to owe the respective sums of money set opposite to their respective names in
the schedule hereto to be paid to Esquire, Judge of the said
District Court of his successors in office or assigns; and in default
of payment of the said respective sums, the said R. P. H., W. B., and T. P. are willing
and do agree each for himself, his heirs, executors and administrators, by these presents;
that the said sums shall be levied, recovered and received of and from them, and every
one of them, and of and from all and singular the manors, messuages, lands,
tenements and hereditaments, goods and chattels of them and every one of them
wheresoever the same shall be found. Witness the day of

19 . Whereas the Government of Bombay have by an order No.
dated the day of 19 , appointed the said R. H. H.
Official Receiver under section 57 of the Provincial Insolvency Act (V of 1920) and he
has thereby become liable to give security to be approved of by the said District Court.
And whereas the said Judge has approved of the said W. B. and T. P. to be sureties
for the said R. P. H., in the amounts set opposite to their respective names in the schedule
hereto and has also approved of the above written recognizance, with the underwritten
condition as a proper security to be entered into by the said R. P. H., and T. P., and in
testimony of such approbation.....Esquire, the judge
of the said Court hath signed his name in the margin hereof. Now the condition of the
abovewritten recognizance is such that if the said R. P. H., his executors or administra-
tors or any of them do and shall duly account for what the said R. P. H. shall receive or
get under his control, or become liable to pay, as Official Receiver at such periods and in
such manner as the said Courts shall appoint, and pay the same as the said Court direct,
then the above recognizance to be void, otherwise to remain in full force and virtue.

The schedule above referred to.

R. P. H.	..	..	..	..	thousand rupees.
W. B.	..	..	..	..	thousand rupees.
T. P.	..	..	..	..	thousand rupees.

Taken and acknowledged by the abovenamed R. P. H., etc., etc.

Rules—Prov. I. A.
Bombay.

Form No. 17.
Register of Insolvency Petition.

1	2	3	4	5	6	7	8
No. & date of petition.	Names of (a) petitioners and (b) opponents.	Nature of petition, etc.	(a) Total amount of alleged debts. (b) Total amount of proved debts.	(a) Total amount of alleged assets. (b) Description & total amount of assets realized.	Names or designation of Receiver, fees paid to him and dates of payment.	Brief note of interim orders passed by the Court and dates thereof, e.g., re dismissal of petition, adjudication, appointment of Receiver, annulment, framing Schedule of creditors scheme or composition, declaration of dividends, etc.	Summary of final order and date thereof, e.g., re discharge, annulment, enforcement of penal provisions, etc.

Bombay, 31st October 1924.

Sd/- N. D. GHARDA,

Registrar.

(Published in "Bombay Government Gazette" for 1924, Part I, pages 2698 to 2713.)

**Rules—Prov. I. A.
Allahabad.****PROVINCIAL INSOLVENCY RULES,
ALLAHABAD.**

The following amendments are made in the General Rules (Civil) of 1911, with the previous approval of Government as required by section 79 of the Provincial Insolvency Act V of 1920 :—

For the rules in Chapter XIX substitute the following rules :—

1. These rules may be cited as "The Agra Provincial Insolvency Rules." The forms Nos. 138 to 152 (shown in Volume II, Appendices) with such variations as circumstances may require shall be used for the matters to which they severally relate.

2. Every insolvency petition shall be entered in the Register of Insolvency Petitions (Form No. 80) to be maintained in all courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number.

3. All insolvency proceedings may be inspected by the Receiver, the debtor, and any creditor who has tendered proof of his debts, or any legal representative on their behalf at such times and subject to the same rules as other Court records.

Notices.

4. Whenever publication of any notice or other matter is required by the Act to be made in an official gazette, or is required by the rules framed under the Act to be made in a local newspaper, a memorandum referring to and giving the date of such advertisement shall be filed with the record and noted in the order sheet.

5. Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall, in addition to the publication thereof in the local official gazette as required by the Act, be also advertised in such newspaper or newspapers as the Court may direct.

A copy of the notice shall also be forwarded by registered letter to each creditor of the address given in the petition. The same procedure shall be followed in respect to notices of the date for consideration of a proposal for composition or schemes of arrangement under section 38 (1).

6. Notice of an order of adjudication under section 30 which is required by the Act to be published in the local official gazette shall also be published in such local newspaper or newspapers as the Court may think fit. When the debtor is a Government servant, a copy of the order shall be sent to the Head of the Office in which he is employed.

The same procedure shall be followed in regard to notices or orders annulling an adjudication under section 37 (2).

7. The notice to be given by the Court under section 50 shall be served on the creditor or his pleader or shall be sent through the post by registered letter.

8. The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

9. Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official gazette and in such local newspapers as the Judge may direct and copies shall be sent by registered post to all creditors whether they have proved or not.

Rules—Prov. I. A.

Allahabad.

10. A certificate of an officer of the Court or of the Official Receiver or an affidavit by a Receiver that any notice referred to in the preceding rules has been duly posted accompanied by the post office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11. In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance by affixing copies in the court-house or by beat of drum in the village in which the insolvent resides.

Receivers.

12. Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor, and forwarded to the person appointed.

13. (a) A Court when fixing the remuneration of a Receiver shall as a rule direct it to be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

(b) When a Receiver realizes the security of a secured creditor the Court may direct additional remuneration to be paid to him with reference to the amount of work done by him and the benefit resulting therefrom to the creditors.

14. The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

15. The Receiver shall ordinarily deposit the money realized by him in the Government Treasury or whenever for any particular reason any money in any case is placed in a bank approved by the Court in fixed deposit bearing interest, the amount of interest shall be credited to the estate.

16. The Receiver shall submit to the Court each quarter not later than the 10th day of the month next succeeding the quarter to which it relates, an account showing all the receipts and disbursements in the case or cases in which he is Receiver.

17. Whenever there are no funds in the estate and the Receiver receives financial help from any creditor he should show in the accounts of the estate the amount so received.

18. Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's accounts (or any part thereof) relating to the estate, as shown by the cash book up-to-date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies. No Court-fee will be required for such copies.

19. In any case in which a meeting of creditors is necessary and in any case in which the debtor proposes a composition or scheme under section 38, the Receiver shall give at least 14 days' notice to the debtor and to every creditor of the time and place appointed for each meeting. Such notices shall be served by registered post.

Proof of debts.

20. A creditor's proof may be in form No. 143 in the Appendix with such variation as circumstances may require.

21. In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be

Rules—Prov. I. A.

Allahabad. sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors. Such proof should be in Form No. 144 in the Appendix.

Procedure when the debtor is a firm.

22. Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall also add his own signature, *e.g.*, "Brown & Co., by James Green, a partner in the said firm."

23. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court upon partners, or upon any person having at the time of service the control or management of the partnership business there.

24. The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction of a name or style other than his own.

25. Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm's name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

26. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

27. In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

28. The joint creditors, and each set of separate creditors may severally accept compositions or schemes of arrangements. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

29. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

30. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Applications and notices.

31. (a) Every application to the Court either by the Receiver or by any creditor or by any person either claiming to be entitled to any alleged assets of the debtor, or

Rules—Prov. I. A.

Allahabad.

complaining of any act of the Receiver, and in particular, and without prejudice to the generality of this rule, for an order deciding any questions under sections 4, 51, 52, 53, 54 and 55 or any one of them, shall (unless otherwise provided by these rules, or unless the Court shall in any particular case otherwise direct) be made by application in writing and shall be supported by an affidavit by the applicant.

(b) Every such application shall state in substance the nature of the order or relief applied for, the section of the Act under which such application is made the grounds upon which such order or relief is claimed, and the sections of any other Act relied upon.

(c) Every such application shall also state whether the applicant desires or intends to call witnesses at the hearing in support thereof and shall specify with precise identification the documents upon which the applicant intends to rely.

(d) Where such application is made by an applicant other than the Receiver, a copy of such application, and a copy of the affidavit in support thereof shall be served upon the Receiver, together with copies of the documents upon which the applicant intends to rely as mentioned in sub-section (c) hereof, unless the number or volume of such document is exceptionally great in which case notice of the fact shall be given to the Receiver, and an opportunity shall be afforded to the Receiver of examining the originals seven clear days at least before the hearing.

(e) Where such application is made by the Receiver, the affidavit in support thereof shall identify any statement of the debtor made to the Receiver, which is either on the file or in the Receiver's possession and on which the Receiver intends to rely.

(f) Any party to the application shall be entitled to inspect the original of any document which has been either filed, or mentioned in the affidavit made in support of such application, or of which any copy has been exhibited to such affidavit.

(g) A copy of every application mentioned in sub-section (a) hereof, and of the affidavit in support of such application shall be served upon the Receiver whether or not any relief or order is expressly claimed against him.

Sale of immovable property of insolvent.

32. If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sells any immovable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the presiding officer of the Court. The cost of registration [if any] will also be borne by the purchaser.

Dividends.

33. The amount of the dividend may at the request and risk of the creditor be transmitted to him by post.

Summary administration.

34. When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely:—

(i) There shall be no advertisement of any proceeding in the Official Gazette or a local paper.

(ii) The petition and all subsequent proceedings shall be endorsed "summary case."

**Rules—Prov. I. A.
Allahabad.**

- (iii) The notice of the hearing of the petition to the creditors shall be in Form No. 151 in the Appendix.
- (iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will often not be necessary and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Costs.

35. All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the costs of the petitioning creditor shall be taxed and be payable out of the estate.

36. No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the Court refused to approve the composition or scheme.

37. Where an order of adjudication is made on a debtor's petition, and the Court is satisfied that the debtor is unable to pay the cost of publication in the local official gazette, of the notice required by section 30 of the Act, the Court shall direct that such cost be met from the sale proceeds of the property of the insolvent. If the insolvent has no property, or if the sale proceeds are insufficient, such cost or the irrecoverable balance thereof shall be remitted.

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**PRESIDENCY-TOWNS INSOLVENCY
ACT, 1909.**

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P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.	P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.
2	<i>cf.</i> 168	<i>cf.</i> 167	2	17	<i>cf.</i> 9 & 20	<i>cf.</i> 7 & 18	28 (2) (6)
3	<i>cf.</i> 92	<i>cf.</i> 96		18	10 (2) & 11	9 (1), (2)	29
4	<i>cf.</i> 94 (2)	<i>cf.</i> 97 (2)		18a			
5	<i>cf.</i> 98	<i>cf.</i> 101		19	12	10	
6	<i>cf.</i> 99	<i>cf.</i> 102	80	20	20 (2)	18 (2)	30
7	102 (1)	105 (1)	4	21	35 (1), 36	29 (1), 29 (4)	35
8	<i>cf.</i> 104	<i>cf.</i> 108	68, 75	22			36
9	4	1 (1), 2	6	23	35 (2), (3)	29 (2), (3)	37, 43 (2)
10	5	3	7	24	16 (1), (2), (3), 70 (2)	14 (1), (2), (3)	33
11	<i>cf.</i> 6 (1)(d)	<i>cf.</i> 4 (1)(d)	11	25			31
12	6 (1) (a) to (c) & 6 (2)	4 (1) (a) to (c), 4 (2)	9	26	15	13	
13	7	5	<i>cf.</i> 12, 14, 24, 25, 27 (1)	27	17, 2 (of B.A., 1890)	15	59A
14			10	28	3 (of B.A., 1890)	16	38 (1), (2), (3)
15	8	6	13, 25	29	3 (5)-(10) (of B.A., 1890)	16 (5)-(10)	38 (4) to (7)
16	10 (1)	8	20	30	3 (11), (12), (14) (of B.A., 1890)	16 (11), (12), (14)	20, 39

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P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.	P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.
31	3 (15) (of B.A., 1890)	16 (15)	40	47	38	31	46
32	19	17	39	48	39	32	
33	24	22	22, 28 (1), 69	49	40 (3) to (5)	33 (6) to (8)	61
34	25	23	32	50	42 (of B.A., 1883) 28 (of B.A., 1890)	35 (1)	
35	26	24		51	43	37 (1)	28 (7)
36	27	25	59A.	52	44	48	28 (3), (4), (5)
37				53	45, 46 (3)	40	51
38	8 (of B.A., 1890)	26	41 (1), (2)	54	11 (of B.A., 1890)	41	52
39	8 (2), (3) to (7) (of B.A., 1890)	26 (2) to (5)	42	55	47	42 (1), (4)	53, 54A
40	8 (6) (1890)	26 (7)	41 (1)	56	48	44 (1), (2)	54, 54A
41			43 (1)	57	49	45	55
42	8 (2) (of B.A., 1890)	26 (2)		58	50	62	56 (3)
43	8 (8) (of B.A., 1890)	26 (9)		59	51	49	56 (3)
44	29	27		60	53	51	
45	30	28	44	61	54 (3)	53 (3)	.
46	37	30	33 (1) proviso, 34 (1), (2)	62	55 (1), (2), 13 (of B.A., 1890)	54 (1), (2)	

Comparative Table—*contd.*

P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.	P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.
63	55 (3)	54 (3)		80	79	84	
64	55 (4)	54 (4)		81	72	82	(56) (2) (b), 57 (4)
65	55 (5)	54 (5)		82	81 (2)	87 (2)	56 (4)
66	55 (6)	54 (6)		83	83	76	
67	55 (7)	54 (7)		84	85	94	
68	56, 57	55, 56	59	85	89	79	
69	58	62	59	86	90	80	68
70	59 (1)	63 (1)		87	91	81	56 (4)
71	60	64	62	88	22 (1), 5 (of B.A., 1890)	20 (1)	67A
72	61	65	63	89			67A
73	62	67	64	90	105	109	5, 24 (3)
74	63	68	65	91	106	110	15
75	64	57, 58	66	92	107	111	16
76	65	69	67	93	108	112	17
77	21 (2), 66	19, 70	56 (1), (2), (3)	94	109	113	
78	68 (2)	72 (2)		95	110	114	
79	69 (1), 69	72 (1), 73		96	111	115	

Comparative Table—*contd.*

P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.	P.-t. I. A. Ss.	B. A., 1883. Ss.	B. A., 1914. Ss.	Prov. I. A., 1920. Ss.
97	112	116		112	127 (1)	132 (1)	79 (1), (2)
98	113	117		113			
99	115	119	79 (2) (c)	114			79 (3)
100	119	123		115	144	148	
101		108 (3)	68 proviso	116	132	137	
102	31	155	72	117			
103			69	118	143	147	
103A			73	119			
104			70	120	150	151	
105	167	162	71	121	151	152	
106	121	129	74	122	162 (1), (2)	153	
107	123	126	8	123	162 (4)	153 (4)	
108	125, 21 (2) (of B.A., 1890)	130		124			
109	125 (5) to (8)	130 (4) to (7)		125			
110	125 (9)	130 (8)		126	118	122	77
111				127			

Comparative Table—*contd.*

P.-t. I. A. Sch., rr.	B. A., 1883. Sch., rr.	B. A., 1914. Sch., rr.	Prov. I. A., 1920. Ss.	P.-t. I. A. Sch., rr.	B. A., 1883. Sch., rr.	B. A., 1914. Sch., rr.	Prov. I. A., 1920. Ss.
Sch. I, r. 1	Sch. I, r. 5	Sch. I, r. 5		Sch. I, r. 15	Sch. I, r. 14	Sch. I, r. 14	
Sch. I, r. 2	Sch. I, r. 6	Sch. I, r. 6		Sch. I, r. 16	Sch. I, r. 15	Sch. I, r. 15	
Sch. I, r. 3	Sch. I, r. 2	Sch. I, r. 2		Sch. I, r. 17	Sec. 22, B.A., 1890	Sec. 20	
Sch. I, r. 4				Sch. I, r. 18	Sch. I, r. 17	Sch. I, r. 18	
Sch. I, r. 5				Sch. I, r. 19	Sch. I, r. 19	Sch. I, r. 20	
Sch. I, r. 6				Sch. I, r. 20	Sch. I, r. 21	Sch. I, r. 22	
Sch. I, r. 7	Sch. I, r. 7	Sch. I, r. 7		Sch. I, r. 21	Sch. I, r. 22	Sch. I, r. 23	
Sch. I, r. 8				Sch. I, r. 22	Sch. I, r. 25	Sch. I, r. 26	
Sch. I, r. 9	Sch. I, r. 8	Sch. I, r. 8		Sch. II, r. 1	Sch. II, r. 1	Sch. II, r. 1	33
Sch. I, r. 10	Sch. I, r. 9	Sch. I, r. 9		Sch. II, r. 2	Sch. II, r. 2	Sch. II, r. 2	49
Sch. I, r. 11	Sch. I, r. 10	Sch. I, r. 10		Sch. II, r. 3	Sch. II, r. 3	Sch. II, r. 3	
Sch. I, r. 12	•			Sch. II, r. 4	Sch. II, r. 4	Sch. II, r. 4	
Sch. I, r. 13	Sch. I, r. 12	Sch. I, r. 12		Sch. II, r. 5	Sch. II, r. 5	Sch. II, r. 5	
Sch. I, r. 14	Sch. I, r. 13	Sch. I, r. 13		Sch. II, r. 6	Sch. II, r. 6	Sch. II, r. 6	

Comparative Table—*concl.*

P.-t. I. A. Sch., rr.	B. A., 1883. Sch., rr.	B. A., 1914. Sch., rr.	Prov. I. A., 1920. Se.	P.-t. I. A. Sch., rr.	B. A., 1883. Sch., rr.	B. A., 1914. Sch., rr.	Prov. I. A., 1920. Se.
Sch. II, r. 7	Sch. II, r. 7	Sch. II, r. 7		Sch. II, r. 18			.
Sch. II, r. 8	Sch. II, r. 8	Sch. II, r. 8		Sch. II, r. 19			
Sch. II, r. 9	Sch. II, r. 9	Sch. II, r. 10		Sch. II, r. 20			
Sch. II, r. 10	Sch. II, r. 10	Sch. II, r. 11		Sch. II, r. 21			
Sch. II, r. 11	Sch. II, r. 11	Sch. II, r. 12		Sch. II, r. 22	Sch. II, r. 19	Sch. II, r. 20	
Sch. II, r. 12	Sch. II, r. 12	Sch. II, r. 13		Sch. II, r. 23	Sch. II, r. 20	Sch. II, r. 21	48
Sch. II, r. 13	Sch. II, r. 13	Sch. II, r. 14		Sch. II, r. 24	Sch. II, r. 21	Sch. II, r. 22	45
Sch. II, r. 14	Sch. II, r. 14	Sch. II, r. 15		Sch. II, r. 25	Sch. II, r. 22	Sch. II, r. 23	
Sch. II, r. 15	Sch. II, r. 15	Sch. II, r. 16		Sch. II, r. 26	Sch. II, r. 23	Sch. II, r. 24	59
Sch. II, r. 16	Sch. II, r. 16	Sch. II, r. 17		Sch. II, r. 27	Sch. II, r. 25	Sch. II, r. 26	50
Sch. II, r. 17	Sch. II, r. 17	Sch. II, r. 18					

THE PRESIDENCY-TOWNS INSOLVENCY ACT.

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THE PRESIDENCY-TOWNS INSOLVENCY ACT.

(III of 1909.) (a)

[12th March 1909.]

An Act to amend the law of Insolvency in the Presidency-towns and the town of Rangoon.

Whereas it is expedient to amend the law relating to insolvency in the Presidency-towns and the(b) [towns of Rangoon and Karachi]; It is hereby enacted as follows :—

PRELIMINARY.

Short title and com- 1. (1) This Act may be called the Presidency-towns
mencement. Insolvency Act, 1909.

(2) It shall come into force on the first day of January 1910.

Definitions. 2. In this Act, unless there is anything repugnant in
the subject or context,—

(a) “ creditor ” includes a decree-holder ;

(b) “ debt ” includes a judgment-debt, and “ debtor ” includes a judgment-debtor ;

(c) [(bb) “ judge ” includes a Judicial Commissioner and an Additional Judicial Commissioner ;

(bbb) “ limits of the ordinary original civil jurisdiction ” means, in respect of the (d) [Court of Judicial Commissioner of Sind] the limits of the municipal district of Karachi as from time to time constituted under the Bombay District Municipal Act, 1901, the Port of Karachi, the Cantonments of Karachi and Manora, and any area within the original civil jurisdiction of the said Court notified in this behalf by the Local Government.]

(c) “ official assignee ” includes an acting official assignee (e) [and a deputy official assignee, whether permanent or acting].

(d) “ prescribed ” means prescribed by rules ;

(e) “ property ” includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit ;

(f) “ rules ” means rules made under this Act ;

(a) For Statement of Objects and Reasons, see “ Gazette of India,” 1908, Pt. V, p. 275, for Report of Select Committee, see *ibid*, 1909, Pt. V, page 3 ; and for Proceedings in Council, see *ibid*, 1908, Pt. VI, pages 41 and 182, and *ibid*, 1909, Pt. VI, pages 12 and 22.

(b) These words were substituted for the words “ town of Rangoon ” by s. 4 (a) and (b) of the Insolvency (Amendment) Act, 1926 (9 of 1926).

(c) These definitions were inserted by s. 3, *ibid*.

(d) The words “ Chief Court of Sind ” are to be read for the words “ Court of the Judicial Commissioner of Sind ” when the Sindh Courts (Supplementary) Act, 1926 (34 of 1926) comes into force.

(e) These words were added by the Insolvency Law (Amendment) Act, 1930 (10 of 1930).

- (g) "secured creditor" includes a landlord who under any enactment for the time being in force has a charge on land for the rent of that land; P.-t. I. A.
ss. 2-6
- (h) "the Court" means the Court exercising jurisdiction under this Act; and
- (i) "transfer of property" includes a transfer of any interest therein and any charge created thereon.

Courts under Presidency-towns Insolvency Act.—P. 31, para. 51.

PART I.

CONSTITUTION AND POWERS OF COURT.

Jurisdiction.

Courts having jurisdiction in Insolvency. 3. The Courts having jurisdiction in insolvency under this Act shall be—

- (a) the High Courts of Judicature at Fort William, Madras, (f) [Bombay and Rangoon], and
- (b) (g) [the Court of Judicial Commissioner of Sind].

Parallel enactments.—*Cf.* B.A., 1883, s. 92; B.A., 1914, s. 96.

Courts under Presidency-towns Insolvency Act.—P. 31, para. 51.

Jurisdiction of Courts under Presidency-towns Insolvency Act.—P. 31, para. 52.

4. All matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges of the Court, and the Chief Justice or (h) [Judicial Commissioner] shall, from time to time, assign a Judge for that purpose.

Jurisdiction to be exercised by a single Judge.

Parallel enactments.—*Cf.* B.A., 1883, s. 94 (2); B.A., 1914, s. 97 (2).

5. Subject to the provisions of this Act and of rules, the Judge of a Court exercising jurisdiction in insolvency may exercise in chambers the whole or any part of his jurisdiction.

Exercise of jurisdiction in chambers.

Parallel enactments.—*Cf.* B.A., 1883, s. 98; B.A., 1914, s. 101.

6. (1) The Chief Justice or (i) [Judicial Commissioner] may, from time to time (j) direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, an officer of the Court appointed by him in this behalf shall have all

Delegation of powers to officers of Court.

(f) These words were substituted for the words "and Bombay" by s. 4 (a) and (b) of the Insolvency (Amendment) Act, 1926 (9 of 1926).

(g) These words were inserted by the Insolvency (Amendment) Act, 1926 (9 of 1926) and are to be replaced by the words "the Chief Court of Sind" when the Sind Courts (Supplementary) Act, 1926 (34 of 1926) comes into force.

(h) These words were substituted by ss. 5 & 6 of the Insolvency (Amendment) Act, 1926 (9 of 1926), and are to be replaced by the words "Chief Judge" when Act 34 of 1926 comes into force.

(i) These words were substituted by ss. 5 and 6 of the Insolvency (Amendment) Act, 1926 (9 of 1926), and are to be replaced by the words "Chief Judge" when Act 34 of 1926 comes into force.

(j) For order issued by Chief Justice of High Court, Madras, see "Fort St. George Gazette," 1910 Pt. II, p. 735.

P.-t. I. A. or any of the powers in this section mentioned ; and any order made or act done by such officer in the exercise of the said powers shall be deemed the order or act of the Court.

ss. 6, 7

(2) The powers referred to in sub-section (1) are the following, namely:—

- (a) to hear insolvency petitions presented by debtors, and to make orders of adjudication thereon ;
- (b) to hold the public examination of insolvents ;
- (c) to make any order or exercise any jurisdiction which is prescribed as proper to be made or exercised in chambers ;
- (d) to hear and determine any unopposed or *ex-parte* application ;
- (e) to examine any person summoned by the Court under section 36.

(3) An officer appointed under this section shall not have power to commit for contempt of Court.

Parallel enactments.—*Cf.* B.A., 1883, s. 99 ; B.A., 1914, s. 102.

7. Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case :

Power of Court to decide all questions arising in Insolvency.

(k) [Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section.]

Parallel enactments.—B.A., 1883, s. 102 (1) ; B.A., 1914, s. 105 (1) ; Prov. I. A., s. 4.

Jurisdiction to decide questions arising in insolvency.—P. 33, para. 57.

Corresponding sections of Bankruptcy Acts.—Pp. 33 and 34, para. 57A.

Superior title of trustee in bankruptcy in certain cases.—Pp. 33-36, para. 58.

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Letters Patent.—Pp. 38 and 39, para. 60.

Cases under Presidency-towns Insolvency Act, s. 7.—Pp. 39-41, para. 60A.

Calcutta decisions.—P. 41, para. 60B.

Bombay decisions.—P. 42, para. 61.

Madras decisions.—Pp. 42-44, para. 62.

Amendment of the section.—Pp. 44-47, para. 62A.

Transfers within sec. 53 of the Transfer of Property Act, 1882.—Pp. 48 and 49, 52 and 53, paras. 62C and 66.

Time for taking objection to exercise of jurisdiction.—P. 49, para. 62D.

Limitation.—P. 49, para. 62E.

(k) This proviso was added by s. 2 of the Presidency-towns Insolvency (Amendment) Act, 1927 (1) of 1927.

Appeals.

Appeals in Insolvency.

8. (1) The Court may review, rescind or vary any order made by it under its insolvency jurisdiction.

P. 4. I. A.

s. 8

(2) Orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows, namely:—

(a) an appeal from an order made by an officer of the Court empowered under section 6 shall lie to the Judge assigned under section 4 for the transaction and disposal of matters in insolvency and no further appeal shall lie except by leave of such Judge;

(b) save as otherwise provided in clause (a), an appeal from an order made by a Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.

Parallel enactments.—*Cf.* B.A., 1883, s. 104; B. A., 1914, s. 108; Prov. I. A. s. 75.

Appeals and Review.—P. 522.

Sub-sec. (1)

Review and re-hearing.—P. 523, para. 774.

Powers of Court to review and re-hearing.—P. 524, para. 776.

Who may apply for a review.—P. 524, para. 777.

Application to what Court.—P. 524, para. 778.

Orders made by officer empowered under s. 6.—P. 525, para. 779.

Limitation for application for review.—P. 525, para. 780.

Appeal from order on review.—P. 526, para. 781.

Sub-sec. (2)

Appeal from orders of officer empowered under s. 6.—P. 526, para. 782.

Appeal from orders of Judge exercising insolvency jurisdiction.—P. 527, para. 783.

Appeal to what Court.—P. 527, para. 784.

Orders appealable.—P. 527, para. 785.

Who may appeal.—P. 528, para. 786.

Person aggrieved.—P. 528, para. 787.

Appeal against order of adjudication.—P. 529, para. 788.

Petitioning creditor.—P. 534, para. 789.

Appeal by insolvent.—P. 534, para. 790.

Appeal by Official Assignee.—P. 535, para. 791.

Appeal by creditors.—P. 535, para. 792.

Appeal against refusal to hear.—P. 537, para. 793.

Order for private examination.—P. 537, para. 794.

Contempt of Court.—P. 537, para. 795.

Order for administration in insolvency of estate of person dying insolvent.—P. 537, para. 796.

Notice to Official Assignee.—P. 537, para. 797.

Orders which may be made in appeal.—P. 538, para. 798.

Security for costs.—P. 538, para. 799.

Special leave to appeal.—P. 538, para. 800.

Where judges differ in opinion.—P. 538, para. 801.

Appeal to Privy Council.—P. 539, para. 802.

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Limitation for appeal from order of officer empowered under s. 6.—P. 539, para. 803.

Limitation for appeal from order of Judge exercising insolvency jurisdiction.—P. 539, para. 804.

PART II.

PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE.

Acts of insolvency.

9. A debtor commits an act of insolvency in each of the following cases, namely :—

Acts of insolvency.

- (a) if, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally ;
- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors ;
- (c) if, in British India or elsewhere, he makes any transfer of his property or of any part thereof, which would, under his or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent ;
- (d) if, with intent to defeat or delay his creditors,—
 - (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him ;
- (e) if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money ;
- (f) if he petitions to be adjudged an insolvent ;
- (g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts ;
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation.—For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act.

Parallel enactments.—B.A., 1883, s. 4; B.A., 1914, ss. 1 (1), 2; Prov. I. A., s. 6. **P.-t. I. A.**
s. 9

Jurisdiction to make adjudication order.—P. 62, para. 82.

Debtor.—P. 62, para. 83.

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Cl. (a)—Transfer for the benefit of creditors.

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Sale or mortgage of substantially the whole property for past debts.—P. 80, para. 101.

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Transfer of part only of debtor's property.—P. 87, para. 109.

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Cl. (c)—Transfer by way of fraudulent preference.

Transfer by way of fraudulent preference.—P. 89, para. 115.

Cl. (d)—Departure from British India or dwelling-house or place of business.

Avoiding creditors.—P. 89, para. 116.

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Cl. (e)—Sale or attachment in execution.

Sale or attachment in execution.—Pp. 92 and 93, para. 121.

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Cl. (f)—Petition by debtor for adjudication.

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Notice of suspension of payment.—P. 96, para. 126.

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Non-traders.—P. 99, para. 134.

Cl. (h)—Imprisonment in execution of money decree.

Remaining in prison.—P. 99, para. 135.

Explanation.—Act of Insolvency committed by agent.

Act of insolvency committed by agent.—Pp. 100-103, para. 136.

Partner as agent.—P. 104, para. 137.

Order of adjudication.

10. Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

Power to adjudicate.

Explanation.—The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication. **P.t. I. A. ss. 10-12**

Parallel enactments.—B.A., 1883, s. 5 ; B.A., 1914, s. 3 ; Prov. I. A., s. 7.

Power to adjudication.—P. 110, para. 139.

Restrictions on jurisdiction.

11. The Court shall not have jurisdiction to make an order of adjudication unless—

- (a) the debtor is, at the time of the presentation of the insolvency petition, imprisoned in execution of the decree of a Court for the payment of money in any prison to which debtors are ordinarily committed by the Court in the exercise of its ordinary original jurisdiction ; or
- (b) the debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling-house or has carried on business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court ; or
- (c) the debtor personally works for gain within those limits ; or
- (d) in the case of a petition by or against a firm of debtors the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits.

Parallel enactments.—*Cf.* B.A., 1883, s. 6 (1) (d) ; B.A., 1914, s. 4 (1) (d) ; Prov. I. A., s. 11.

Court to which petition should be presented.—P. 110, para. 140.

Restriction on jurisdiction.—P. 111, para. 140A.

Imprisonment within jurisdiction.—P. 111, para. 141

Ordinarily resides or has a dwelling-house.—P. 111, para. 142.

Carrying on business.—P. 112, para. 143.

Carrying on business through an agent.—P. 112, para. 144.

Adjudication of firm.—P. 113, para. 145.

Presentation of petition to a wrong Court.—P. 113, para. 146.

Conditions on which creditor may petition.

12. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and
- (b) the debt is a liquidated sum payable either immediately or at some certain future time, and
- (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give

P.-t. I. A. an estimate of the value of the security. In the latter case he may be admitted
ss. 12, 13 as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

Parallel enactments.—B.A., 1883, s. 6 (1) (a) to (c), 6 (2) ; B.A., 1914, s. 4 (1) (a) to (c), 4 (2) ; Prov. I. A., s. 9.

Requisites of creditor's petition.—P. 114, para. 147.

Who may be a petitioning creditor.—P. 114, para. 148.

Debt must exist before act of insolvency.—P. 117, para. 149.

Amount of debt.—P. 117, para. 150.

Debt must be liquidated.—P. 117, para. 151.

What debt insufficient.—P. 118, para. 152.

Joint debtors.—P. 118, para. 153.

Act of insolvency must be within three months of petition.—P. 118, para. 154.

Secured creditor's petition.—P. 119, para. 155.

Limitation.—P. 119, para. 156.

13. (1) A creditor's petition shall be verified by affidavit of the
 Proceedings and order on creditor's petition. creditor, or of some person on his behalf having knowledge of the facts.

(2) At the hearing the Court shall require proof of—

(a) the debt of the petitioning creditor, and

(b) the act of insolvency or, if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency.

(3) The Court may adjourn the hearing of the petition and order service thereof on the debtor.

(4) The Court shall dismiss the petition—

(a) if it is not satisfied with the proof of the facts referred to in subsection (2) ; or

(b) if the debtor appears and satisfies the Court that he is able to pay his debts, or that he has not committed an act of insolvency or that for other sufficient cause no order ought to be made.

(5) The Court may make an order of adjudication if it is satisfied with the proof above referred to, or if on a hearing adjourned under subsection (3) the debtor does not appear and service of the petition on him is proved, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

(6) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against the debtor in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(7) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make an order of adjudication on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition on which proceedings have been stayed as aforesaid. **P.-t. I. A. ss. 13, 14**

(8) A creditor's petition shall not, after presentation, be withdrawn without leave of the Court.

Parallel enactments.—B.A., 1883, s. 7; B.A., 1914, s. 5; cf. Prov. I. A, ss. 12, 14, 24, 25, 27 (1).

Contents and verification of creditor's petition.—P. 120, para. 157.

Amendment of petition.—P. 120, para. 158.

Facts to be proved at the hearing.—P. 120, para. 159.

Debtor as a witness.—P. 120, para. 160.

Inquiry into consideration for debt: power to go behind judgment.—P. 121, para. 161.

Service of petition.—P. 121, para. 162.

Adjourning hearing of petition.—P. 122, para. 163.

Dismissal of petition.—P. 122, para. 164.

Petition may be dismissed for sufficient cause.—P. 122, para. 165.

Abuse of bankruptcy laws.—P. 123, para. 166.

Where insolvency proceedings are pending in another Court.—P. 124, para. 167.

Dismissal of petition after discharge.—P. 125, para. 168.

Order of adjudication.—P. 125, para. 169.

Stay of proceedings to ascertain amount of debt.—P. 125, para. 170.

When order of adjudication takes effect.—P. 126, para. 170A.

Withdrawal of petition.—P. 153, para. 227.

No withdrawal after adjudication.—P. 153, para. 228.

Conditions on which
debtor may petition.

14. (l) (1) A debtor shall not be entitled to present an insolvency petition unless—

- (a) his debts amount to five hundred rupees, or
- (b) he has been arrested and imprisoned in execution of the decree of any Court for the payment of money, or
- (c) an order of attachment in execution of such a decree has been made and is subsisting against his property.

(m) [(2) A debtor in respect of whom an order of adjudication, whether made under this Act or under the Provincial Insolvency Act, 1920, has been annulled owing to his failure to apply or to prosecute an application for his discharge shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.]

(l) This section was re-numbered by s. 2 of the Insolvency (Amendment) Act, 1927 (11 of 1927).

(m) This sub-section was added, *ibid.*

P.-t. I. A.
ss. 14-16

Parallel enactments.—Prov. I. A., s. 10.

Conditions on which debtor may petition.—P. 127, para. 171.

Debts must amount to Rs. 500.—P. 127, para. 172.

Imprisonment of debtor.—P. 127, para. 173.

Attachment of debtor's property.—P. 127, para. 174.

Second petition by undischarged insolvent.—P. 128, para. 175.

15. (1) A debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition, the Court may thereupon make an order of adjudication, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

Proceedings and order on debtor's petition.

(2) A debtor's petition shall not, after presentation, be withdrawn without the leave of the Court.

(n) [(3) On the making of the order admitting his petition, a debtor shall—

(a) unless the Court otherwise directs, produce all his books of account, and

(b) file such lists of creditors and debtors and afford such assistance to the Court as may be prescribed,

failing which the Court may dismiss his petition.]

Parallel enactments.—B.A., 1883, s. 8; B.A., 1914, s. 6; Prov. I. A., ss. 13, 25.

Contents of debtor's petition.—P. 129, para. 176

Dismissal of debtor's petition.—P. 129, para. 177.

Order of adjudication.—P. 129, para. 178.

Refusal to adjudicate on debtor's petition on ground of abuse of process of law.—P. 130, para. 181.

Withdrawal of petition.—P. 153, para. 227.

No withdrawal after adjudication.—P. 153, para. 228.

Consolidation of petitions.—P. 154, para. 229.

Power to change carriage of petition.—P. 154, para. 230.

Continuance of proceedings on death of debtor.—P. 155, para. 231.

Power to dismiss petition against some respondents.—P. 156, para. 232.

Power to stay proceedings.—P. 157, para. 233.

Malicious proceedings in insolvency.—P. 157, para. 234.

Reference of insolvency petition to arbitration.—P. 158, para. 236.

16. The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of an insolvency petition and before an order of adjudication is made, appoint the official assignee to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or any part thereof, and the

Discretionary powers as to appointment of interim receiver.

(n) This sub-section was added by s. 3 of the Presidency-towns Insolvency (Amendment) Act, 1927 (19 of 1927).

official assignee shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure, 1908, as may be prescribed. **P.-t. I. A. ss. 16-18**

Parallel enactments.—B.A., 1883, s. 10 (1) ; B.A., 1914, s. 8 ; Prov. I. A., s. 20.
Interim receiver.—P. 159, para. 237.

17. On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose :

Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Parallel enactments.—*Cf.* B.A., 1883, ss. 9, 20 ; B.A., 1914, ss. 7, 18 ; Prov. I. A., s. 23 (2), (b).

Official Assignee as guardian of public morality.—P. 166, para. 244.

Vesting of property in Official Assignee.—P. 167, para. 245.

Successive insolvencies in different Courts.—P. 169, para. 246.

Leave to sue when necessary.—P. 170, para. 249.

Leave must be obtained before institution of suit.—P. 171, para. 250.

During the pendency of insolvency proceedings.—P. 174, para. 251.

Leave to sue does not imply leave to execute.—P. 174, para. 252.

Leave when not necessary.—P. 175, para. 253.

Suits commenced before adjudication order.—P. 175, para. 254.

Execution against insolvent's property.—P. 176, para. 255.

Execution against person of insolvent.—P. 178, para. 256.

Limitation.—P. 180, para. 257.

Who are secured creditors.—P. 182, para. 258.

Rights of secured creditors not affected by adjudication.—P. 183, para. 259.

Secured creditor and leave to sue.—P. 183, para. 260.

Only equity of redemption vests in Official Assignee.—P. 184, para. 261.

Suit to realize security : joinder of Official Assignee.—P. 185, para. 262.

Dispute as to validity of mortgage.—P. 185, para. 263.

Effect of adjudication on transactions.—P. 189, para. 273.

18. (1) The Court may, at any time after the making of an order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court.

(2) An order made under sub-section (1) may be served by sending a copy thereof, under the seal of the Court, by post to the address for service

P.-t. I. A. ss. 18-19 of the plaintiff or other party prosecuting such suit or proceeding, and notice of such order shall be sent to the Court before which the suit or proceeding is pending.

(3) Any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under this Act, either stay the proceedings or allow them to continue on such terms as it may think just.

Parallel enactments.—B.A., 1883, ss. 10 (2), 11; B.A., 1914, s. 9 (1) (2); Prov. I. A., s. 29.

Stay of suits and other proceedings.—P. 185, para. 264.

Power of Insolvency Court to stay suit or execution proceeding.—P. 185, para. 265.

Power of civil Court to stay suits pending before it.—P. 187, para. 266.

Power to stay discretionary.—P. 187, para. 267.

What proceedings may be stayed and what not.—P. 187, para. 268.

Whether suits commenced after adjudication can be stayed.—P. 188, para. 269.

Stay of execution against insolvent's property.—P. 189, para. 270.

Stay of execution against insolvent's person.—P. 189, para. 271.

Secured creditors and stay of suit.—P. 189, para. 272.

(a) [**18A.** (1) The Court may, at any time after the presentation of an insolvency petition, stay any insolvency proceedings pending against the debtor in any Court subject to the superintendence of the Court, and may, at any time after the making of an order of adjudication, annul an adjudication against the debtor made by any such Court.

Control over insolvency proceedings in subordinate Courts.

(2) Where an adjudication is annulled under sub-section (1), all sales and dispositions of property and payments duly made and all acts done by the Court whose order is annulled, or by the receiver appointed by it or other person acting under his authority, shall be valid, but the property vested in such Court or receiver shall vest in the official assignee, and the Court may make such direction in regard to the custody of such property as it thinks fit.

(3) Notice of the order annulling an adjudication under sub-section (1) shall be published in the local official Gazette and in such other manner as may be prescribed.]

Power of High Court to stay insolvency proceedings pending in subordinate Courts.—P. 186, para. 265A.

19. (1) If in any case the Court, having regard to the nature of the debtor's estate or business or to the interests of the creditors generally, is of opinion that a special manager of the estate or business ought to be appointed to assist the official assignee, the Court may appoint a manager thereof accordingly to act for such time as the Court may authorize, and to have such

Power to appoint special manager.

powers, of the official assignee as may be entrusted to him by the official assignee or as the Court may direct.

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ss. 19-21**

(2) The special manager shall give security and furnish accounts in such manner as the Court may direct, and shall receive such remuneration as the Court may determine.

Parallel enactments.—B.A., 1883, s. 12; B.A., 1914, s. 10.

Spécial manager.—P. 169, para. 247.

20. Notice of every order of adjudication, stating the name, address and description of the insolvent, the date of the adjudication, the Court by which the adjudication is made and the date of presentation of the petition, shall be published in the "Gazette of India" and in the local official Gazette and in such other manner as may be prescribed.

Advertisement of order of adjudication.

Parallel enactments.—B.A., 1883, s. 20 (2); B.A., 1914, s. 18 (2); Prov. I. A., s. 30.

Advertisement of order of adjudication.—P. 129, para. 179.

Annulment of adjudication.

21. (1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court may, on the application of any person interested, by order annul the adjudication (p) [and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition].

Power for Court to annul adjudication in certain cases.

(2) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.

Parallel enactments.—B.A., 1883, ss. 35 (1), 36; B.A., 1914, s. 29 (1), (4); Prov. I. A., s. 35.

When adjudication may be annulled.—Pp. 222-224, paras. 333-336.

Who may apply for annulment.—P. 224, para. 335.

When adjudication may be annulled.—P. 224, para. 336.

Where the debtor ought not to have been adjudged an insolvent.—P. 224, para. 337.

Where debts are paid in full.—P. 224, para. 338.

Power to annul discretionary.—P. 225, para. 339.

(p) These words were added by s. 3 of the Insolvency (Amendment) Act, 1927 (11 of 1927).

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ss. 21-24

Inherent power to annul adjudication.—P. 226, para. 341.

When annulment may be refused.—P. 228, para. 342.

Where debtor's petition presented without leave of Court.—P. 229, para. 343.

Limitation.—P. 229, para. 344.

22. Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court whether within or without British India against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon.

Concurrent proceedings in British Courts.

Parallel enactments.—Prov. I. A., s. 36.

Concurrent orders of adjudication.—P. 230, para. 346.

Power to annul or stay proceedings discretionary.—P. 230, para. 347.

23. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official assignee or other person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such terms and subject to such conditions (if any) as the Court may declare by order.

Proceedings on annulment.

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled as aforesaid, the Court may, if it thinks fit, recommit the debtor to his former custody, and the jailor or keeper of the prison to whose custody such debtor is so recommitted shall receive such debtor into his custody according to such recommitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if such order had not been made.

(3) Notice of the order annulling an adjudication shall be published in the "Gazette of India" and in the local official Gazette and in such other manner as may be prescribed.

Parallel enactments.—B.A., 1883, s. 35 (2) (3); B.A., 1914, s. 29 (2) (3); Prov. I. A., ss. 37, 43 (2).

Effect of annulment.—P. 238, para. 357.

Effect on suits and other proceedings.—P. 239, para. 358.

Vesting of property in person appointed by Court.—P. 240, para. 359.

Effect of annulment on forfeiture clauses.—P. 240, para. 364, p. 337, para. 503.

Proceedings consequent on order of adjudication.

24. (1) Where an order of adjudication is made against a debtor, he shall prepare and submit to the Court a schedule verified by affidavit, in such form and containing such particulars of and in relation to his affairs as may be prescribed.

Insolvent's schedule.

(2) The schedule shall be so submitted within the following times, **P.-t. I. A.**
namely :— **ss. 24, 25**

(a) if the order is made on the petition of the debtor, within thirty days from the date of the order,

(b) if the order is made on the petition of a creditor, within thirty days from the date of service of the order.

(3) If the insolvent fails, without reasonable excuse, to comply with the requirements of this section, the Court may, on the application of the official assignee or of any creditor, make an order for his committal to the civil prison.

(4) If the insolvent fails to prepare and submit any such schedule as aforesaid, the official assignee may, at the expense of the state, cause such a schedule to be prepared in manner prescribed.

Parallel enactments.—B.A., 1883, ss. 16 (1) to (3), 70 (2); B.A., 1914, s. 14 (1) to (3); Prov. I. A., s. 33.

Insolvent's schedule.—P. 192, para. 276.

25. (1) Any insolvent who shall have submitted his schedule as aforesaid may apply to the Court for protection, and **Protection order.** the Court may, on such application, make an order for the protection of the insolvent from arrest or detention.

(2) A protection order may apply either to all the debts mentioned in the schedule or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit.

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order shall apply, and any insolvent arrested or detained contrary to the terms of such order shall be entitled to his release :

Provided that no such order shall operate to prejudice the right of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order, but the insolvent shall be *prima facie* entitled to such order on production of a certificate signed by the official assignee that he has so far conformed to the provisions of this Act.

(5) The Court may make a protection order before an insolvent has submitted his schedule if it thinks it necessary to do so in the interests of the creditors.

Parallel enactments.—Prov. I. A., s. 31

Protection order.—P. 192, para. 277.

Discretion of Court.—P. 193, para. 278.

Official Assignee's certificate.—P. 194, para. 279.

Protection before submission of schedule.—P. 194, para. 280.

Refusal of protection order.—P. 194, para. 281.

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ss. 26, 27

26. (1) At any time after the making of an order of adjudication against an insolvent, the Court, on the application of ^{Meetings of creditors.} a creditor or of the official assignee, may direct that a meeting of creditors shall be held to consider the circumstances of the insolvency and the insolvent's schedule and his explanation thereof and generally as to the mode of dealing with the property of the insolvent.

(2) With respect to the summoning of and proceedings at a meeting of creditors the rules in the First Schedule shall be observed.

Parallel enactments.—B.A., 1883, s. 15; B.A., 1914, s. 13.

Meetings of creditors.—P. 195, para. 282.

27. (1) Where the Court makes an order of adjudication it shall hold a public sitting on a day to be appointed by the ^{Public examination of the insolvent.} Court, of which notice shall be given to creditors in the prescribed manner, for the examination of the insolvent, and the insolvent shall attend thereat, and shall be examined as to his conduct, dealings and property.

(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the filing of the insolvent's schedule.

(3) Any creditor who has tendered a proof or a legal practitioner on his behalf may question the insolvent concerning his affairs and the causes of his failure.

(4) The official assignee shall take part in the examination of the insolvent; and for the purpose thereof, subject to such directions as the Court may give, may be represented by a legal practitioner.

(5) The Court may put such questions to the insolvent as it may think expedient.

(6) The insolvent shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing and shall be read over either to or by the insolvent and signed by him, and may thereafter be used in evidence against him and shall be open to the inspection of any creditor at all reasonable times.

(7) When the Court is of opinion that the affairs of the insolvent have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not preclude the Court from directing further examination of the insolvent whenever it may deem fit to do so.

(8) Where the insolvent is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the Court makes him unfit to attend his public examination, or is a woman who according to the customs and manners of the country ought not to be compelled to appear in public, the Court may make an order dispensing with such examination,

or directing that the insolvent be examined on such terms, in such manner and at such place as to the Court seems expedient. **P. A. I. A. ss. 27-29**

Parallel enactments.—B.A., 1883, s. 17; B.A., 1914, s. 15; Prov. I. A., s. 59A.

Public examination of insolvent.—P. 198, para. 283.

Scope of the examination.—P. 198, para. 284.

Incriminating questions.—P. 199, para. 285.

Use of answers in evidence.—P. 199, para. 285A.

Notes of examination.—P. 200, para. 286.

Application for examination when to be made.—P. 200, para. 287.

Composition and schemes of arrangement.

28. (1) An insolvent may at any time after the making of an order of adjudication submit a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs in the prescribed form, and such proposal shall be submitted by the official assignee to a meeting of creditors.

(2) The official assignee shall send to each creditor who is mentioned in the schedule, or who has tendered a proof before the meeting, a copy of the insolvent's proposals with a report thereon, and if on the consideration of such proposal the majority in number and three-fourths in value of all the creditors whose debts are proved resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The insolvent may at the meeting amend the terms of his proposal if the amendment is in the opinion of the official assignee calculated to benefit the general body of creditors.

(4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter, in the prescribed form addressed to the official assignee so as to be received by him not later than the day preceding the meeting, and any such assent or dissent shall have effect as if the creditor had been present and had voted at the meeting.

Parallel enactments.—B.A., 1890, s. 3; B.A., 1914, s. 16; Prov. I. A., s. 38 (1)

(2) (3).

Composition apart from insolvency acts.—P. 241, para. 361.

Composition after presentation of petition.—P. 242, para. 362.

Composition after adjudication.—P. 242, para. 363.

Proposal of composition or scheme.—P. 242, para. 364.

Notice of meeting to creditors.—P. 243, para. 365.

Acceptance by creditors.—P. 243, para. 366.

29. (1) The insolvent or the official assignee may after the proposal is accepted by the creditors apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved.

(2) Except where an estate is being summarily administered or special leave of the Court has been obtained, the application shall not be heard until after the conclusion of the public examination of the insolvent. Any creditor

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who has proved may be heard by the Court in opposition to the application notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal.

(3) The Court shall before approving the proposal hear a report of the official assignee as to the terms thereof and as to the conduct of the insolvent and any objections which may be made by or on behalf of any creditor.

(4) Where the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or in any case in which the Court is required to refuse the insolvent's discharge the Court shall refuse to approve the proposal.

(5) Where any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than four annas in the rupee on all the unsecured debts provable against the debtor's estate.

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case the Court may either approve or refuse to approve the proposal.

Parallel enactments.—B.A., 1890, s. 3 (5) to (10); B.A., 1914, s. 16 (5) to (10); Prov. I. A., s. 38 (4) to (7).

Application to Court to approve composition or scheme.—P. 244, para. 368.

Approval of proposal by Court.—P. 244, para. 369.

Object of approval of Court.—P. 245, para. 370.

Matters to be taken into consideration by Court.—P. 245, para. 371.

Power of Court.—P. 246, para. 372.

When Court absolutely bound to refuse.—P. 246, para. 373.

When Court bound to refuse unless certain conditions fulfilled.—P. 247, para. 374.

Withdrawals and releases of debts.—P. 249, para. 375.

30. (1) If the Court approves the proposal, the terms shall be embodied in an order of the Court, and an order shall be made annulling the adjudication, and the provisions of section 23, sub-sections (1) and (3) shall thereupon apply, and the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable in insolvency.

(2) The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.

Parallel enactments.—B.A., 1883, s. 3 (11) (12) (14); B.A., 1914, s. 16 (11) (12) (14); Prov. I. A., ss. 20, 39.

Annulment of adjudication.—P. 249, para. 376.

Jurisdiction of Court after approval of composition.—P. 250, para. 377.

Effect of approval of composition on rights of creditors.—P. 251, para. 378.

Creditor's remedy in default of payment.—P. 254, para. 379A.

Secured creditors.—P. 256, para. 380.

Expunging debts from schedule.—P. 256, para. 381.

Right of trustees to sue.—P. 256, para. 382.

Costs of Official Assignee.—P. 256, para. 383.

Re-vesting of property in insolvent on annulment.—P. 256, para. 384.

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31. (1) If default is made in the payment of any instalment due in pursuance of any composition or scheme, approved as aforesaid, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, re-adjudge the debtor insolvent and annul the composition or scheme, and the property of the debtor shall thereupon vest in the official assignee but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme.

(2) Where a debtor is re-adjudged insolvent under sub-section (1), all debts provable in other respects which have been contracted before the date of such re-adjudication shall be provable in the insolvency.

Parallel enactments.—B.A., 1883, s. 3 (15); B.A., 1914, s. 16 (15); Prov. I. A., s. 40.

Power to re-adjudge debtor insolvent.—P. 256, para. 384.

Re-adjudging debtor insolvent.—P. 257, para. 385.

Death of insolvent after approval of composition.—P. 257, para. 386.

Liability of surety after annulment of composition.—P. 257, para. 387.

Debts contracted before re-adjudication.—P. 257, para. 389.

32. Notwithstanding the acceptance and approval of a composition or scheme, the composition or scheme shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the insolvent would not be discharged by an order of discharge in insolvency, unless the creditor assents to the composition or scheme.

Limitation of effect of composition or scheme.

Parallel enactments.—B.A., 1883, s. 19; B.A., 1914, s. 17; Prov. I. A., s. 39.

Effect of approval of composition on rights of creditors.—P. 251, para. 378.

Control over person and property of insolvent.

33. (1) Every insolvent shall, unless prevented by sickness or other sufficient cause, attend any meeting of his creditors which the official assignee may require him to attend, and shall submit, to such examination and give such information as the meeting may require.

Duties of insolvent as to discovery and realization of property.

(2) The insolvent shall—

(a) give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively,

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- (b) submit to such examination in respect of his property or his creditors,
- (c) wait at such times and places on the official assignee or special manager,
- (d) execute such powers-of-attorney, transfers and instruments, and
- (e) generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors,

as may be required by the official assignee or special manager or may be prescribed or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official assignee or special manager, or any creditor or person interested.

(3) The insolvent shall aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.

(4) If the insolvent wilfully fails to perform the duties imposed upon him by this section, or to deliver up possession to the official assignee of any part of his property, which is divisible amongst his creditors under this Act and which is for the time being in his possession or under his control, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court, and may be punished accordingly.

Parallel enactments.—B.A., 1883, s. 24; B.A., 1914, s. 22; Prov. I. A., ss. 22, 28 (1), 69.

Duties of insolvent as to discovery and realization of property.—P. 200, para. 288.

Insolvent to execute transfers of his property.—P. 201, para. 289.

Insolvent to aid Official Assignee.—P. 201, para. 290.

Committal for contempt.—P. 202, para. 291.

Committal after discharge.—P. 202, para. 292.

34. (1) The Court may, either of its own motion or at the instance of the official assignee or of any creditor, by warrant addressed to any police officer or prescribed officer of the Court, cause an insolvent to be arrested, and committed to the civil prison or if in prison to be detained until such time as the Court may order, under the following circumstances, namely :—

Arrest of insolvent.

- (a) if it appears to the Court that there is probable reason for believing that he has absconded or is about to abscond with a view of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying or embarrassing proceedings in insolvency against him ;
or
- (b) if it appears to the Court that there is probable reason for believing that he is about to remove his property with a view of preventing or delaying possession being taken of it by the official assignee, or that there is probable reason for believing that he has concealed

or is about to conceal or destroy any of his property or any books, documents or writings which might be of use to his creditors in the course of his insolvency; or **P.-t. I. A. ss. 34-36**

- (c) if he removes any property in his possession above the value of fifty rupees without the leave of the official assignee.

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.

Parallel enactments.—B.A., 1883, s. 25; B.A., 1914, s. 23; Prov. I. A., s. 32.

Arrest of insolvent.—P. 202, para. 293.

Mode of execution of warrant.—P. 203, para. 294.

Absconding before presentation of petition.—P. 203, para. 295.

Removal of property without leave of Official Assignee.—P. 203, para. 296.

Fraudulent preference.—P. 203, para. 297.

35. Where the official assignee has been appointed interim receiver or an order of adjudication is made, the Court, on the application of the official assignee, may, from time to time, order that for such time, not exceeding three months, as the Court thinks fit, all post letters, whether registered or unregistered, parcels and money orders addressed to the debtor at any place or places mentioned in the order for re-direction, shall be re-directed, or delivered by the Postal authorities in British India, to the official assignee, or otherwise as the Court directs; and the same shall be done accordingly.

Re-direction of letters.

Parallel enactments.—B.A., 1883, s. 26; B.A., 1914, s. 24.

Who may apply for re-direction.—P. 203, para. 299.

36. (1) The Court may, on the application of the official assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

Discovery of insolvent's property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination.

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(3) The Court may examine any person so brought before it concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.

(4) (g) [If on his examination any such person admits] that he is indebted to the insolvent, the Court may, on the application of the official assignee, order him to pay to the official assignee, at such time and in such manner as to the Court seems expedient, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not as the Court thinks fit, with or without costs of the examination.

(5) (g) [If, on his examination any such person admits] that he has in his possession any property belonging to the insolvent, the Court may, on the application of the official assignee, order him to deliver to the official assignee that property, or any part thereof, at such time, in such manner and on such terms as to the Court may seem just.

(6) Orders made under sub-sections (4) and (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908, respectively.

(7) Any person making any payment or delivery in pursuance of an order made under sub-section (4) or sub-section (5) shall by such payment or delivery be discharged from all liability whatsoever in respect of such debt or property.

Parallel enactments.—B.A., 1883, s. 27; B.A., 1914, s. 25; Prov. I. A., s. 59A.

Private examination of insolvent and others.—P. 203, para. 300.

Previous enactments.—P. 204, para. 301.

Object of private examination.—P. 204, para. 302.

Who may apply for examination.—P. 205, para. 303.

Order may be made *ex parte*.—P. 205, para. 304.

Who may be present at the examination.—P. 205, para. 305.

Scope of inquiry.—P. 205, para. 306.

Incriminating questions.—P. 207, para. 307.

When answers may be used against person giving them.—P. 207, para. 308.

Examination after discharge of insolvent.—P. 209, para. 309.

Examination when may be refused.—P. 209, para. 310.

Purdanashin ladies.—P. 210, para. 310A.

Professional assistance for insolvent and witnesses.—P. 210, para. 311.

Persons residing more than 200 miles from Court-house.—P. 211, para. 312.

Expenses of witness.—P. 212, para. 313.

Production of documents.—P. 212, para. 314.

Order for payment and delivery of property.—P. 213, para. 315.

Who may apply for payment or delivery of property.—P. 215, para. 316.

Matters within exclusive jurisdiction of Revenue Courts.—P. 215, para. 317.

37. The Court shall have the same powers to issue commissions and letters of request for the examination on commission or otherwise of any person liable to examination

Power to issue com-
missions.

(g) These words were substituted for the words "If, on the examination of any such person, the Court is satisfied" by s. 4 of the Presidency-towns Insolvency (Amendment) Act, 1927 (19 of 1927).

under section 36 as it has for the examination of witnesses under the Code of Civil Procedure, 1908. **P.-t. I. A. ss. 37-39**

Discharge of Insolvent.

38. (1) An insolvent may, at any time after the order of adjudication, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but, save where the public examination of the insolvent has been dispensed with under the provisions of this Act, the application shall not be heard until after such examination has been concluded. The application shall be heard in open Court.

(2) On the hearing of the application, the Court shall take into consideration any report of the official assignee as to the insolvent's conduct and affairs and, subject to the provisions of section 39, may—

- (a) grant or refuse an absolute order of discharge, or
- (b) suspend the operation of the order for a specified time, or
- (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

Parallel enactments.—B.A., 1890, s. 8 ; B.A., 1914, s. 26 ; Prov. I. A., s. 41 (1) (2).

Historical review.—P. 258, para. 391.

Application for discharge.—P. 258, para. 392.

Notice of application.—P. 259, para. 393.

Report of Official Assignee.—P. 259, para. 394.

Hearing of application.—P. 259, para. 395.

Discretion of Court.—P. 260, para. 396.

Matters to be considered by Court.—P. 260, para. 397.

Powers of Court as to discharge.—P. 261, para. 398.

39. (1) The Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act, or under sections 421 to 424 of the Indian Penal Code, and shall, on proof of any of the facts hereinafter mentioned, either—

Cases in which the Court must refuse an absolute discharge.

- (a) refuse the discharge ; or
- (b) suspend the discharge for a specified time ; or
- (c) suspend the discharge until a dividend of not less than four annas in the rupee has been paid to the creditors ; or
- (d) require the insolvent as a condition of his discharge to consent to a decree being passed against him in favour of the official assignee for any balance or part of any balance of the debts provable under the insolvency which is not satisfied at the date of his discharge such balance or part of any balance of the debts to be paid out

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of the future earnings or after-acquired property of the insolvent in such manner and subject to such conditions as the Court may direct ; but in that case the decree shall not be executed without leave of the Court, which leave may be given on proof that the insolvent since his discharge acquired property or income available for payment of his debts.

(2) The facts hereinbefore referred to are—

- (a) that the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of such value has arisen from circumstances for which he cannot justly be held responsible ;
- (b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency ;
- (c) that the insolvent has continued to trade after knowing himself to be insolvent ;
- (d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it ;
- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ;
- (f) that the insolvent has brought on or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living or by gambling, or by culpable neglect of his business affairs ;
- (g) that the insolvent has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any suit properly brought against him ;
- (h) that the insolvent has within three months preceding the time of presentation of the petition incurred unjustifiable expense by bringing a frivolous or vexatious suit.
- (i) that the insolvent has within three months preceding the date of the presentation of the petition, when unable to pay his debts as they become due, given an undue preference to any of his creditors ;
- (j) that the insolvent has concealed or removed his books or his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust.

(3) The power of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently. **P.-t. I. A. ss. 39-42**

(4) On any application for discharge the report of the official assignee shall be *prima facie* evidence and the Court may presume the correctness of any statement contained therein.

Parallel enactments.—B.A., 1890, s. 8 (2) to (7); B.A., 1914, s. 26 (2) to (5); Prov. I. A., s. 42.

Restriction on powers of Court.—P. 262, para. 399.

Absolute refusal of discharge.—P. 262, para. 400.

Refusal of immediate unconditional discharge.—P. 263, para. 401.

Facts which prevent immediate unconditional discharge.—P. 266, para. 403.

Immediate unconditional discharge.—P. 271, para. 404.

Suspension of discharge.—P. 271, para. 405.

Discharge subject to conditions.—P. 272, para. 406.

Refusal of discharge with liberty to apply.—P. 273, para. 407.

40. Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner and sent one month at least before the day so appointed to each creditor who has proved, and the Court may hear the official assignee and may also hear any creditor. At the hearing the Court may put such questions to the insolvent and receive such evidence as it may think fit.

Hearing of application for discharge.

Parallel enactments.—B.A., 1890, s. 8 (6); B.A., 1914, s. 26 (7); Prov. I. A., s. 41 (1).

41. If an insolvent does not appear on the day so appointed for hearing his application for discharge or if an insolvent shall not apply to the Court for an order of discharge within such time as may be prescribed, the Court on the application of the official assignee or of a creditor or of its own motion, may annul the adjudication or make such other order as it may think fit, and the provisions of section 23 shall apply on such annulment.

Power to annul adjudication on failure to apply for discharge.

Parallel enactments.—Prov. I. A., s. 43 (1).

Annulment on failure to apply for discharge.—P. 232, para. 349.

Power to annul discretionary.—P. 232, para. 350.

Insolvency proceedings do not terminate ipso facto on annulment.—P. 236, para. 354.

Remedy of debtor on annulment.—P. 236, para. 355.

42. (1) Where the Court refuses the discharge of the insolvent it may, after such time and in such circumstances as may be prescribed, permit him to renew his application.

Renewal of application and variation of terms of order.

(2) Where an order of discharge is made subject to conditions and at any time after the expiration of two years from the date of the order the insolvent shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court

P.-t. I. A. sa. 42-45 may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

Parallel enactments.—B.A., 1890, s. 8 (2); B.A., 1914, s. 26 (2).

Renewal of application for discharge.—P. 273, para. 408.

Variation of terms of order of discharge.—P. 274, para. 409.

43. A discharged insolvent shall, notwithstanding his discharge, give such assistance as the official assignee may require in the realization and distribution of such of his property as is vested in the official assignee, and, if he fails to do so, shall be guilty of a contempt of Court; and the Court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition or payment duly made or thing duly done subsequent to the discharge, but before its revocation.

Parallel enactments.—B.A., 1890, s. 8 (8); B.A., 1914, s. 26 (9).

**Fraudulent settle-
ments.**

44. In either of the following cases, that is to say:—

- (1) in the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or
- (2) in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife);

if the settlor is adjudged insolvent or compounds or arranges with his creditors, and it appears to the Court that the settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend an order of discharge or grant an order subject to conditions or refuse to approve a composition or arrangement.

Parallel enactments.—B.A., 1883, s. 29; B.A., 1914, s. 27.

Effect of order of discharge. **45.** (1) An order of discharge shall not release the insolvent from—

- (a) any debt due to the Crown;
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party; or
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party; or
- (d) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts provable in insolvency.

(3) An order of discharge shall be conclusive evidence of the insolvency **P.t. I. A.**
and of the validity of the proceedings therein. **ss. 45, 46.**

(4) An order of discharge shall not release any person who at the date of the presentation of the petition was a partner or co-trustee with the insolvent or was jointly bound or had made any joint contract with him, or any person, who was surety or in the nature of a surety for him.

Parallel enactments.—B.A., 1883, s. 30; B.A., 1914, s. 28; Prov. I. A., s. 44.

Effect of order of discharge.—P. 276, para. 413.

Excepted debts.—P. 276, para. 414.

Provable debts and discharge.—P. 278, para. 415.

Debts not provable and discharge.—P. 278, para. 416.

Order of discharge and surety.—P. 278, para. 417.

Promise to pay a debt barred by discharge.—P. 279, para. 418.

Property acquired by insolvent after discharge.—P. 279, para. 419.

Order of discharge conclusive evidence of insolvency.—P. 279, para. 420.

Criminal liability.—P. 280, para. 421.

Effect of Indian and foreign order of discharge.—P. 280, para. 422.

Discharge of insolvent not a termination of insolvency proceeding.—P. 280, para. 423.

Duties of insolvent after discharge.—P. 281, para. 424.

Revocation of order of discharge.—P. 281, para. 425.

PART III.

ADMINISTRATION OF PROPERTY.

Proof of debts.

46. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable in insolvency.

(2) A person having notice of the presentation of any insolvency petition by or against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as provided by sub-sections (1) and (2), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency.

(4) An estimate shall be made by the official assignee of the value of any debt or liability provable as aforesaid which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value:

Provided that if in his opinion the value of the debt or liability is incapable of being fairly estimated, he shall issue a certificate to that effect, and thereupon the debt or liability shall be deemed to be a debt not provable in insolvency.

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ss. 46, 47

Explanation.—For the purposes of this section “liability” includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor, and generally it includes any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of, money, or money’s worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any contingency or contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion.

Parallel enactments.—B.A., 1883, s. 37; B.A., 1914, s. 30; Prov. I. A., s. 33 (1) proviso, 34 (1) (2).

Effect of insolvency on rights of creditors.—P. 282, para. 427.

Earlier bankruptcy laws.—P. 282, para. 428.

Debts and liabilities not provable in insolvency.—P. 283, para. 429.

Unliquidated damages for tort.—P. 283, para. 430.

Debts contracted after notice of presentation of petition.—P. 283, para. 431.

Contingent debts.—P. 284, para. 432.

Debts not provable by the general policy of the law.—P. 285, para. 433.

Inquiry into consideration for debt.—P. 286, para. 434.

Debts and liability provable in insolvency.—P. 287, para. 435.

Damages arising out of contract.—P. 288, para. 436.

Damages arising out of breach of trust.—P. 288, para. 437.

Contingent liabilities provable in insolvency.—P. 288, para. 438.

Other liabilities provable in insolvency.—P. 290, para. 439.

Benamidars right of proof.—P. 291, para. 440.

Executors right of retainer.—P. 291, para. 441.

Holders of bills of exchange.—P. 291, para. 442.

Double proof.—P. 292, para. 443.

Proof by surety.—P. 292, para. 444.

Accommodation bills.—P. 294, para. 445.

Proof of debts in general.—Pp. 294, 296, paras. 446, 448.

Proof by secured creditors.—Pp. 298-303, paras. 450-460.

Periodical payments.—P. 304, para. 461.

Proof for interest.—Pp. 304-307, paras. 462-467.

47. Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively :

Mutual dealings and set-off.

Provided that a person shall not be entitled under this section to claim the benefits of any set-off against the property of an insolvent in any case where he had at the time of giving credit to the insolvent notice of the presentation of any insolvency petition by or against him.

Parallel enactments.—B.A., 1883, s. 38; B.A., 1914, s. 31; Prov. I. A., s. 46.

Mutual dealings and set-off.—P. 308, para. 468.

Former law as to set-off.—P. 308, para. 469.

Set-off under the Code of Civil Procedure, 1908.—P. 308, para. 470.

What are mutual dealings.—P. 308, para. 471.

o set-off unless claims result in pecuniary liabilities.—P. 309, para. 472.

Debts must be between same parties.—P. 310, para. 473.

Debts must be due in same right.—P. 310, para. 474.

Contributory of company.—P. 310; para. 475.

Costs.—P. 311, para. 476.

Date for ascertaining balance.—P. 311, para. 477.

Effect of notice of presentation of petition.—P. 311, para. 478.

48. With respect to the mode of proving debts, the right of proof by Rules as to proof of secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the Second Schedule the rules in that schedule shall be observed.

Parallel enactments.—B.A., 1883, s. 30; B.A., 1914, s. 32.

49. (1) In the distribution of the property of the insolvent there shall be paid in priority to all other debts—

- (a) all debts due to the Crown or to any local authority;
- (b) all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition, not exceeding three hundred rupees for each such clerk, and one hundred rupees for each such servant or labourer; and
- (c) rent due to a landlord from the insolvent: provided the amount payable under this clause shall not exceed one month's rent.

(2) The debts specified in sub-section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub-section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them.

(4) In the case of partners the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference.

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(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts proved in the insolvency.

Parallel enactments.—B.A., 1883, s. 40 (3) to (5); B.A., 1914, s. 33 (6) to (8); Prov. I. A., s. 61.

Priority of debts.—P. 311, para. 479.

Administration of estate of partners.—P. 313, para. 490.

Where the person is both joint and separate creditor.—P. 314, para. 491.

Proof by partner against partner.—P. 315, para. 492.

Distress for rent due before adjudication.—P. 315, para. 493.

50. After an order of adjudication has been made no distress for rent due before such order shall be made upon the goods or effects of the insolvent, unless the order be annulled, but the landlord or party to whom the rent may be due shall be entitled to prove in respect of such rent.

Rent due before adjudication.

Parallel enactments.—B.A., 1883, s. 42; B.A., 1890, s. 28; B.A., 1914, s. 35 (1).

Property available for payment of debts.

51. The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at—

Relation of assignee's title.

- (a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or
- (b) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition :

Provided that no insolvency petition or order of adjudication shall be rendered invalid by reason of any act of insolvency committed anterior to the debt of the petitioning creditor.

Parallel enactments.—B.A., 1883, s. 43; B.A., 1914, s. 37 (1); Prov. I. A., s. 23 (7).

Meaning of relation back.—P. 411, para. 580.

History of doctrine of relation back.—P. 411, para. 581.

Commencement of insolvency.—P. 412, para. 582.

Transactions impeachable under bankruptcy law.—P. 415, para. 583.

Transactions not impeachable under bankruptcy law.—P. 415, para. 584.

General results of the doctrine of relation back.—P. 416, para. 585.

Payments by insolvent.—P. 417, para. 586.

Transfer of property by insolvent.—P. 417, para. 587.

Payments to insolvent.—P. 417, para. 588.

Trustees under a void deed of transfer.—P. 417, para. 589.

Sham companies.—P. 418, para. 590.

Act of insolvency anterior to petitioning creditor's debt.—P. 418, para. 591.

Description of insolvent's property divisible amongst creditors.

52. (1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following

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particulars, namely :—

- (a) property held by the insolvent on trust for any other person ;
- (b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessaries as aforesaid, not exceeding three hundred rupees in the whole.

(2) Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely :—

- (a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge ;
- (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge ; and
- (c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof :

Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (c) ;

Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (c) may prove for the value of such goods.

Parallel enactments.—B.A., 1883, s. 144 ; B.A., 1914, s. 148 ; Prov. I. A., s. 28 (3) to (5).

Property not divisible among creditors.

Property held on trust.—P. 318, para. 487.

Persons holding property in fiduciary capacity.—P. 318, para. 488.

Right to follow trust property.—P. 319, para. 489.

Beneficial interest of trustee.—P. 320, para. 490.

Trust property and reputed ownership.—P. 321, para. 491.

Specific appropriation.—P. 321, para. 492.

Property held by an insolvent for specific purpose.—P. 327, para. 493.

Money advanced for a specific purpose.—P. 327, para. 494.

Banker.—P. 328, para. 495.

Factor.—P. 330, para. 496.

Auctioneer.—P. 331, para. 497.

Commission agent.—P. 331, para. 498.

Stock brokers.—P. 332, para. 499.

Tools of trade, wearing apparel, etc.—P. 333, para. 500.

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Property divisible among creditors.

- Definition of property.—P. 335, para. 501.
 Possibilities.—P. 335, para. 502.
 Forfeiture clauses in wills and settlements.—P. 335, para. 503.
 Forfeiture of lease on insolvency.—P. 338, para. 504.
 Forfeiture of lease on assignment.—P. 338, para. 505.
 Forfeiture of share in partnership.—P. 339, para. 506.
 Compulsory transfer of shares in a Company.—P. 339, para. 507.
 Additional security to mortgagee on mortgagor's insolvency.—P. 339, para. 508.
 Contracts made by insolvent prior to insolvency.—P. 340, para. 509.
 Contracts involving personal skill.—P. 342, para. 510.
 Contract of service to be rendered to insolvent.—P. 343, para. 511.
 Goodwill.—P. 344, para. 512.
 Things in action.—P. 344, para. 513.
 Share in partnership.—P. 344, para. 514.
 Compulsory deposit in provident fund.—P. 345, para. 515.
 Property abandoned by Official Assignee as worthless.—P. 346, para. 516.
 Patent.—P. 346, para. 517.
 Copyright.—P. 346, para. 518.
 License to seize goods.—P. 346, para. 519.
 Assignment of after-acquired property.—P. 347, para. 520.
 Assignment of future profit of business.—P. 349, para. 521.
 Insolvency of manager, father or other member of joint Hindu family.—P. 350, para. 522.
 Vesting of rights of action in Official Assignee.—P. 353, para. 523.
 Suits by undischarged insolvent.—P. 354, para. 524.
 Official Assignee takes property subject to all equities.—P. 355, para. 525.
 Rule in *Ex parte James*.—P. 357, para. 526.
 Sale of a mere right to sue.—P. 359, para. 527.
 Nature of after-acquired property.—P. 360, paras. 528-529.
 Rule in *Cohen v. Mitchell*.—P. 360, para. 530.
 To what property the rule applies.—P. 362, para. 531.
 Agreements in fraud of bankruptcy law.—P. 365, para. 532.
 Second insolvency.—P. 365, para. 533.
 Effect of intervention of Official Assignee.—P. 366, para. 534.
 After-acquired property—right of action.—P. 367, para. 535.
 Personal earnings.—P. 369, para. 537.
 Profit of trade or business.—P. 370, para. 538.
 Insolvent cannot be compelled to work.—P. 371, para. 539.
 Salary of public officers and others.—P. 371, para. 540.
 Subsequent trade creditors and estoppel of Official Assignee.—P. 372, para. 541.
 General power of appointment.—P. 373, para. 542.
 Meaning of reputed ownership.—P. 374, para. 543.
 History of reputed ownership clause.—P. 375, para. 544.
 When doctrine of reputed ownership applies.—P. 376, para. 545.
 Property must be goods.—P. 377, para. 546.
 Goods must be in possession of insolvent in his trade or business.—P. 378, para. 547.
 Things in action and trade debts.—P. 381, para. 548.
 Goods must be in the possession order or disposition of the insolvent.—P. 383, para. 549.

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Sole possession essential.—P. 386, para. 550.

Mortgages executed by insolvent.—P. 387, para. 551.

At the commencement of the insolvency.—P. 388, para. 552.

Circumstances giving rise to a reputed ownership.—P. 388, para. 553.

Evidence of reputation of ownership.—P. 392, para. 554.

Notoriety of change of ownership.—P. 393, para. 556.

Usage of trade.—P. 393, para. 557.

The true owner must consent.—P. 394, para. 558.

Nature of true owner's consent.—P. 395, para. 559.

Insolvent must not be the true owner.—P. 397, para. 560.

True owner.—P. 398, para. 561.

Secured creditors.—P. 398, para. 562.

Trustees.—P. 399, para. 563.

Executors and administrators.—P. 400, para. 564.

Executor de son tort.—P. 400, para. 565.

Beneficiaries.—P. 400, para. 566.

Builders.—P. 400, para. 567.

Partners.—P. 400, para. 568.

Factors and agents for sale.—P. 401, para. 569.

Bailee for safe custody.—P. 402, para. 570.

Sale or return.—P. 402, para. 571.

Hire purchase agreement.—P. 402, para. 572.

How reputed ownership may be determined.—P. 402, para. 573.

Determination of possession.—P. 403, para. 574.

Determination of consent.—P. 405, para. 575.

Determination of consent in the case of goods.—P. 406, para. 576.

Determination of consent in the case of trade debts.—P. 407, para. 577.

True owner's right of proof.—P. 409, para. 578.

Effect of insolvency on antecedent transactions.

53. (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the official assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of any insolvency petition by or against the debtor.

(2) Nothing in this section shall affect the right of a secured creditor in respect of property against which a decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the official assignee.

Parallel enactments.—B.A., 1883, ss. 45, 46; B.A., 1914, s. 40; Prov. I. A., s. 51.

Rights of creditors under execution.—P. 419, para. 592.

When assets should be realized by creditor.—P. 419, para. 593.

English law.—P. 420, para. 594.

Attachment.—P. 421, para. 595.

Realization of assets.—P. 421, para. 596.

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Garnishee notice.—P. 421, para. 597.

Order for rateable distribution.—P. 422, para. 598.

Receiver of mortgaged property.—P. 422, para. 599.

Secured creditors.—P. 422, para. 600.

Money in Court.—P. 422, para. 601.

Execution-purchaser buying in good faith.—P. 424, para. 602.

54. Where execution of a decree has issued against any property of a debtor which is saleable in execution, and before the sale thereof notice is given to the Court executing the decree that an order of adjudication has been made against the debtor, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the official assignee, but the costs of the execution shall be a first charge on the property so delivered, and the official assignee may sell the property or an adequate part thereof for the purpose of satisfying the charge.

Duties of Court executing decree as to property taken in execution.

Parallel enactments.—B.A., 1890, s. 11; B.A., 1914, s. 41; Prov. I. A., s. 52.

Duties of Court executing decree as to property taken in execution.—P. 425, para. 603.

Sale by executing Court after notice of adjudication.—P. 425, para. 604.

Application for delivery of possession.—P. 426, para. 605.

Property in possession of Court.—P. 427, para. 606.

55. Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the official assignee.

Avoidance of voluntary transfer.

Parallel enactments.—B.A., 1883, s. 47; B.A., 1914, s. 42 (1) (4); Prov. I. A., ss. 53, 54A.

Avoidance of voluntary transfer.—P. 428, para. 608.

History of the section.—P. 428, para. 609.

Whether donee liable if money or property given has been spent or alienated.—P. 428, para. 610.

Burden of proof under this section and sec. 53 of the Transfer of Property Act.—P. 429, para. 611.

Exclusive jurisdiction of Insolvency Court.—P. 429, para. 612.

Suits by secured creditors to realize their security.—P. 431, para. 613.

Application to set aside voluntary transfer.—P. 431, para. 614.

Settlement in consideration of marriage.—P. 433, para. 615.

Purchaser for valuable consideration.—P. 433, para. 616.

Transfer partly for and partly without consideration.—P. 433, para. 617.

Meaning of good faith.—P. 434, para. 618.

Onus of proving good faith and consideration.—P. 434, para. 619.

Meaning of void.—P. 434, para. 620.

Two years how to be calculated.—P. 435, para. 621.

Transfers executed more than two years before insolvency.—P. 436, para. 622.

Extent of avoidance.—P. 437, para. 623.

Encumbrances created by settlor after settlement.—P. 437, para. 624.

Transferees from donees.—P. 437, para. 625.

Trustees lien for costs.—P. 438, para. 626.

Set-off.—P. 438, para. 627.

Property outside local limits.—P. 438, para. 628.

Report of Official Assignee.—P. 439, para. 629.

Transfer under order of Court.—P. 439, para. 630.

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56. (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall if such person is adjudged insolvent on a petition, presented with three months after the date thereof, be deemed fraudulent and void as against the official assignee.

Avoidance of preference in certain cases.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent.

Parallel enactments.—B.A., 1883, s. 48; B.A., 1914, s. 44 (1) (2); Prov. I. A., ss. 54, 54A.

Object of doctrine of fraudulent preference.—P. 440, para. 631.

Previous enactments.—P. 440, para. 632.

Exclusive jurisdiction of Insolvency Court.—P. 441, para. 632A.

Essentials of fraudulent preference.—P. 441, para. 633.

Inability to pay debts.—P. 441, para. 634.

Person preferred must be a creditor.—P. 442, para. 635.

There must have been a preference in fact.—P. 443, para. 636.

View of preferring creditor.—P. 443, para. 637.

Burden of proof.—P. 444, para. 638.

Evidence of intent to prefer.—P. 445, para. 639.

Good faith of preferred creditor immaterial.—P. 445, para. 640.

What pressure sufficient.—P. 446, para. 641.

Threat of legal proceedings.—P. 448, para. 642.

View of benefiting debtor himself.—P. 448, para. 643.

Other circumstances negating intent to prefer.—P. 449, para. 644.

Agent.—P. 450, para. 645.

Adjudication must have been on a petition presented within three months.—P. 451, para. 646.

Fraudulent preference is voidable not void.—P. 451, para. 646A.

Proof by creditor fraudulently preferred.—P. 452, para. 647.

Application by whom to be made.—P. 452, para. 647A.

Preference not avoided for benefit of particular creditor.—P. 453, para. 648.

Position of third persons making title in good faith.—P. 453, para. 649.

Limitation.—P. 454, para. 650.

Payments made after presentation of insolvency petition.—P. 454, para. 651.

57. Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

Protection of bona fide transactions.

(a) any payment by the insolvent to any of his creditors;

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- (b) any payment or delivery to the insolvent ;
- (c) any transfer by the insolvent for valuable consideration ; or
- (d) any contract or dealing by or with the insolvent for valuable consideration :

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

Parallel enactments.—B.A., 1883, s. 40 ; B.A., 1914, s. 45 ; Prov. I. A., s. 55.

Transaction must be bona fide.—P. 455, para. 653.

Dealing by insolvent in respect of his property.—P. 456, para. 654.

(1) Transactions before commencement of insolvency.—P. 457, para. 655.

(2) Transactions between commencement of insolvency and date of order of adjudication.—P. 457, para. 656.

Proceedings in invitum.—P. 461, para. 657.

Payments by insolvent.—P. 461, para. 658.

Payment by insolvent to his solicitor.—P. 462, para. 659.

Payment and delivery to insolvent.—P. 462, para. 660.

Reputed ownership and protected transactions.—P. 463, para. 661.

Payment with notice under contract made without notice.—P. 463, para. 661A.

Valuable consideration.—P. 463, para. 662.

Notice.—P. 463, para. 663.

Burden of proving notice.—P. 463, para. 664.

Subsequent purchasers for value and without notice.—P. 464, para. 665.

Debenture holders, etc.—P. 464, para. 666.

Suit by insolvent after presentation of petition and before adjudication.—P. 465, para. 667.

(3) Transactions after adjudication order.—P. 465, para. 668.

Realization of property.

58. (1) The official assignee shall, as soon as may be, take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery.

Possession of property
by official assignee.

(2) The official assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may on his application enforce such acquisition or retention accordingly.

(3) Where any part of the property of the insolvent consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office or person, the official assignee may exercise the right to transfer the property to the same extent as the insolvent might have exercised it, if he had not become insolvent.

(4) Where any part of the property of the insolvent consists of things in action, such things shall be deemed to have been duly transferred to the official assignee.

(5) Any treasurer or other officer, or any banker, attorney or agent of an insolvent, shall pay and deliver to the official assignee all money and securities in his possession or power as such officer, banker, attorney or agent, which he is not by law entitled to retain as against the insolvent or the official assignee. If he fails so to do, he shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the official assignee.

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Parallel enactments.—B.A., 1883, s. 50; B.A., 1914, s. 62; Prov. I. A., 56 (3).

Possession of property by Official Assignee.—P. 473, para. 680.

Special remedies open the Official Assignee.—P. 474, para. 681.

59. (1) The Court may grant a warrant to any prescribed officer of the Court or any police-officer above the rank of a constable to seize any part of the property of an insolvent in the custody or possession of the insolvent or of any other person, and with a view to such seizure to break open any house, building or room of the insolvent where the insolvent is supposed to be, or any building or receptacle of the insolvent where any of his property is supposed to be.

Seizure of property of
Insolvent.

(2) Where the Court is satisfied that there is reason to believe that property of the insolvent is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search-warrant to any such officer as aforesaid who may execute it according to its tenor.

Parallel enactments.—B.A., 1883, s. 51; B.A., 1914, s. 49; Prov. I. A., s. 56 (3).

Special remedies open to Official Assignee.—P. 474, para. 681.

60. (1) Where an insolvent is an officer of the Army or Navy or of His Majesty's Royal Indian Marine Service, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the official assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary, liable to attachment in execution of a decree as the Court may direct.

Appropriation of portion
of pay or other income
to creditors.

(2) Where an insolvent is in the receipt of a salary or income other than as aforesaid, the Court may, at any time after adjudication and from time to time, make such order as it thinks just for the payment to the official assignee, for distribution among the creditors of so much of such salary or income as may be liable to attachment in execution of a decree, or of any portion thereof.

Parallel enactments.—B.A., 1883, s. 53; B.A., 1914, s. 51.

Salary of public officers and others.—P. 371, para. 540.

61. The property of the insolvent shall pass from official assignee to official assignee, and shall vest in the official assignee for the time being during his continuance in office, without any transfer whatever.

Vesting and transfer
of property.

Parallel enactments.—B.A., 1883, s. 54 (3); B.A., 1914, s. 53 (3).

62. (1) Where any part of the property of an insolvent consists of land of any tenure burdened with onerous covenants, of shares or stocks in companies, of unprofitable contracts, or of any other property that is unsaleable, or not

Disclaimer of onerous
property.

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readily saleable by, reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the official assignee may, notwithstanding that he may have endeavoured to sell or have taken possession of the property, or exercised any act of ownership in relation thereto, but subject always to the provisions hereinafter contained in that behalf, by writing signed by him, at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property :

Provided that, where any such property has not come to the knowledge of the official assignee within one month after such adjudication as aforesaid, he may disclaim the property at any time within twelve months after he has first become aware thereof.

(2) The disclaimer shall operate to determine, as from the date thereof, the rights, interest and liabilities of the insolvent and his property in or in respect of the property disclaimed, and shall also discharge the official assignee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the insolvent and his property and the official assignee from liability, affect the rights, or liabilities of any other person.

Parallel enactments.—B.A., 1883, s. 55 (1) (2) ; B.A., 1914, s. 54 (1) (2).

Earlier statutes.—P. 467, para. 669.

Object of the enactment.—P. 467, para. 670.

Disclaimer by Official Assignee.—P. 468, para. 671.

Effect of disclaimer.—P. 470, para. 674.

63. Subject always to such rules as may be made in this behalf, the official assignee shall not be entitled to disclaim any leasehold interest without the leave of the Court; and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements and other matters arising out of the tenancy, as the Court thinks just.

Disclaimer of lease holds.

Parallel enactments.—B.A., 1883, s. 55 (3) ; B.A., 1914, s. 54 (3).

Disclaimer of leaseholds.—P. 469, para. 673.

64. The official assignee shall not be entitled to disclaim any property in pursuance of section 62 in any case where an application in writing has been made to the official assignee by any person interested in the property requiring him to decide whether he will disclaim, and the official assignee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice that he disclaims the property ; and in the case of a contract, if the official

Power to call on official assignee to disclaim.

assignee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it. **P.t. I. ss. 64-66**

Parallel enactments.—B.A., 1883, s. 55 (4); B.A., 1914, s. 54 (4).

Power of Court to call on Official Assignee to disclaim.—P. 469, para. 672.

65. The Court may, on the application of any person who is, as against the official assignee, entitled to the benefit or subject to the burden of a contract made with the insolvent, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the insolvency.

Power for Court to rescind contract.

Parallel enactments.—B.A., 1883, s. 55 (5); B.A., 1914, s. 54 (5).

Order rescinding contract.—P. 470, para. 675.

66. (1) The Court may, on the application of any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any transfer for the purpose :

Power for Court to make vesting order in respect of disclaimed property.

Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the insolvent, whether as under-lessee or as mortgagee except upon the terms of making such person subject to the same liabilities and obligations as the insolvent was subject to under the lease in respect of the property at the date when the insolvency petition was filed, and any under-lessee or mortgagee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there is no person claiming under the insolvent who is willing to accept an order upon such terms, the Court shall have power to vest the insolvent's interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the insolvent, to perform the lease's covenants in such lease, freed and discharged from all estates, incumbrances and interests created therein by the insolvent.

(2) The Court may, if it thinks fit, modify the terms prescribed by the foregoing proviso so as to make a person in whose behalf the vesting order

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ss. 66-68

may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the insolvency petition was filed and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order.

Parallel enactments.—B.A., 1883, s. 55 (6) ; B.A., 1914, s. 54 (6).

Order vesting disclaimed property.—P. 470, para. 676.

Vesting order in respect of leaseholds.—P. 471, para. 677,

67. Any person injured by the operation of a disclaimer under the foregoing provisions shall be deemed to be a creditor of the insolvent to the amount of the injury, and may accordingly prove the same as a debt under the insolvency.

Persons injured by disclaimer may prove.

Parallel enactments.—B.A., 1883, s. 55 (7) ; B.A., 1914, s. 54 (7).

Persons injured by disclaimer may prove.—P. 472, para. 678.

68. (1) Subject to the provisions of this Act, the official assignee shall, with all convenient speed, realise the property of the insolvent, and for that purpose may—

Duty and powers of official assignee as to realization.

(a) sell all or any part of the property of the insolvent,

(b) give receipts for any money received by him ;

and may, by leave of the Court, do all or any of the following things, namely:—

(c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;

(d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent ;

(e) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court ;

(f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or fully paid shares, debentures or debenture stock in any limited company subject to such stipulations as to security and otherwise as the Court thinks fit ;

(g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business ;

(h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ;

(i) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

(2) The official assignee shall account to the Court and pay over all monies and deal with all securities in such manner as is prescribed or as the Court directs.

Parallel enactments.—B.A., 1883, ss. 56, 57; B.A., 1914, ss. 55, 56; Prov. I. A., s. 59.

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Powers which may be exercised with the leave of the Court.—P. 490, para. 690.

Power of sale.—P. 490.

Sale of goodwill.—P. 481.

Power to give receipts.—P. 482.

Powers which may be exercised without the leave of the Court.—P. 482, para. 691.

Conduct of insolvent's business.—P. 482.

Suits and other legal proceedings.—P. 483.

Employment of legal practitioner.—P. 483.

Acceptance of consideration for sale.—P. 483.

Mortgage of insolvent's property.—P. 483.

Arbitration and compromise.—P. 483.

Division of property in specie.—P. 485.

Suits relating to insolvent's property.—P. 486, para. 694.

Suits by or against Official Assignee.—P. 486, para. 695.

No leave necessary to sue Official Assignee.—P. 488, para. 696.

Notice under sec. 80 of C. P. C., 1908.—P. 488, para. 697.

Notice under O. 21, r. 22 of C. P. C., 1908.—P. 488, para. 698.

Insolvency of plaintiff pending suit.—P. 488, para. 699.

Insolvency of defendant pending suit.—P. 495, para. 700.

Distribution of property.

69. (1) The official assignee shall, with all convenient speed declare and distribute dividends amongst the creditor who have proved their debts.

Declaration and distribution of dividends.

(2) The first dividend (if any) shall be declared and be distributed within (a) [one year] after the adjudication, unless the official assignee satisfies the Court that there is sufficient reason for postponing the declaration to a later date.

(3) Subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and be payable at intervals of not more than six months.

(4) Before declaring a dividend, the official assignee shall cause notice of his intention to do so to be published in the prescribed manner, and shall also send reasonable notice thereof to each creditor mentioned in the insolvent's schedule who has not proved his debt.

(5) When the official assignee has declared a dividend, he shall send to each creditor who has proved a notice showing the amount of the dividend, and when and how it is payable, and, if required by any creditor, a statement in the prescribed form as to the particulars of the estate.

Parallel enactments.—B.A., 1883, s. 58; B.A., 1914, s. 62; Prov. I. A., s. 59.

Distribution of dividends.—P. 492, para. 702.

70. Where one partner in a firm is adjudged insolvent, a creditor to whom the insolvent is indebted jointly with the other partners in the firm or any of them shall not receive any dividend out of the separate property of the

Joint and separate properties.

(a) These words were substituted for the words "six months" by the Presidency-towns Insolvency (Amendment) Act, 1929 (III of 1929).

Prov. I. A. ss. 70-73 insolvent until all the separate creditors have received the full amount of their respective debts.

Parallel enactments.—B.A., 1883, s. 59 (1); B.A., 1914, s. 63 (1).

Joint and separate dividends.—P. 495, para. 712.

71. (1) In the calculation and distribution of dividends, the official assignee shall retain in his hands sufficient assets to meet—
Calculation of dividends.

- (a) debts provable in insolvency and appearing from the insolvent's statements or otherwise to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs;
- (b) debts provable in insolvency the subject of claims not yet determined;
- (c) disputed proofs or claims; and
- (d) the expenses necessary for the administration of the estate or otherwise.

(2) Subject to the provisions of sub-section (1), all money in hand shall be distributed as dividends.

Parallel enactments.—B.A., 1883, s. 60; B.A., 1914, s. 64; Prov. I. A., s. 62.

Calculation of dividends—P. 492, para. 703.

72. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the official assignee any dividend or dividends which he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.
Right of creditor who has not proved debt before declaration of a dividend.

Parallel enactments.—B.A., 1883, s. 61; B.A., 1914, s. 65; Prov. I. A., s. 63.

Calculation of dividends.—P. 492, para. 703.

73. (1) When the official assignee has realized all the property of the insolvent, or so much thereof as can, in his opinion, be realized without needlessly protracting the proceedings in insolvency, he shall, with the leave of the Court, declare a final dividend; but, before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him but not proved that, if they do not prove their claims, to the satisfaction of the Court, within the time limited by the notice, he will proceed to make a final dividend without regard to their claims.
Final dividend.

(2) After the expiration of the time so limited, or, if the Court on application by any such claimant grants him further time for establishing his claim, then on the expiration of that further time, the property of the insolvent

shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

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Parallel enactments.—B.A., 1883, s. 62; B.A., 1914, s. 67; Prov. I. A., s. 64.

Final dividend.—P. 493, para. 704.

Notice of final dividend.—P. 493, para. 705.

When declaration of dividend may be set aside.—P. 493, para. 706.

Lapse of time no bar to proof.—P. 494, para. 707.

Dividend not a debt.—P. 494, para. 707.

Assignee of dividend.—P. 494, para. 709.

Reduction of proof.—P. 495, para. 710.

Dividend payable to the estate of a deceased person.—P. 495, para. 711

Estate administered in two countries.—P. 496, para. 716.

74. No suit for a dividend shall lie against the official assignee, but,

where the official assignee refuses to pay any dividend, the

No suit for dividend. Court may, on the application of the creditor who is aggrieved by such refusal, order him to pay it and also to pay out of his own money interest thereon at such rate as may be prescribed for the time that it is withheld, and the costs of the application.

Parallel enactments.—B.A., 1883, s. 63; B.A., 1914, s. 68; Prov. I. A., s. 65.

75. (1) Subject to such conditions and limitations as may be prescribed, the official assignee may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent, for the benefit of his creditors, and in any other respect to aid in administering

Power to allow insolvent to manage property, and allowance to insolvent for maintenance of service.

the property in such manner and on such terms as the official assignee may direct.

(2) Subject as aforesaid, the Court may, from time to time, make such allowance as it thinks just to the insolvent out of his property, for the support of the insolvent and his family, or in consideration of his services, if he is engaged in winding up his estate, but any such allowance may at any time be varied or determined by the Court.

Parallel enactments.—B.A., 1883, s. 64; B.A., 1914, ss. 57, 58; Prov. I. A., s. 66.

Management by and allowance to insolvent.—P. 495, para. 714.

76. The insolvent shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as provided by this Act and of the expenses of the proceedings taken thereunder.

Right of insolvent to surplus.

Parallel enactments.—B.A., 1883, s. 65; B.A., 1914, s. 69; Prov. I. A., s. 67

Right of insolvent to surplus.—P. 496, para. 715.

Attachment of surplus.—P. 496, para. 715A.

Estate administered in two countries.—P. 496, para. 716.

PART IV.

OFFICIAL ASSIGNEES.

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77. (1) The Chief Justice of each of the High Courts of Judicature at Fort William, Madras, (t) [Bombay and Rangoon and the (u) Judicial Commissioner of Sind] may from time to time appoint substantively or temporarily such person as he thinks fit to the office of official assignee of insolvents' estates (v) [and such person or persons as he thinks fit to the office of deputy official assignee] for each of the said Courts respectively, and may, with the concurrence of a majority of the other Judges of the Court, remove the person for the time being holding (w) [any of the said offices] for any cause appearing to the Court sufficient.

(x) [(1A) Subject to rules made under section 112, the deputy official assignee shall have all the powers and shall discharge all the duties and in exercise of such powers and in the discharge of such duties shall be subject to all the liabilities of the official assignee under this Act.]

(2) Every official assignee (y) [and every deputy official assignee] shall give such security and shall be subject to such rules and shall act in such manner as may be prescribed.

(3) Notwithstanding anything in sub-section (1), the persons substantively or temporarily holding the office of official assignee immediately before the commencement of this Act in the Courts for the relief of Insolvent Debtors at Calcutta, Madras and Bombay respectively under the (z) Indian Insolvency Act, 1848, and in the Chief Court of Lower Burma under that Act as applied by the (a) Lower Burma Courts Act, 1900, shall, without further appointment for that purpose, become the official assignees, substantive or temporary, as the case may be, under this Act in the High Courts at Fort William, Madras and Bombay and in the Chief Court of Lower Burma, respectively.

Parallel enactments.—B.A., 1883, ss. 21 (2), 66; B.A., 1914, ss. 19, 70; Prov. I. A., s. 56 (1) to (3).

78. An official assignee may, for the purpose of affidavits verifying proofs, petitions or other proceedings under this Act, administer oaths.

Power to administer
oath.

Parallel enactments.—B.A., 1883, s. 68 (2); B.A., 1914, s. 72 (2).

(t) These words were substituted for the words "and Bombay, and the Chief Judge of the Chief Court of Lower Burma" by s. 7 of the Insolvency (Amendment) Act, 1926 (9 of 1926).

(u) The words "Chief Judge of the Chief Court of Sind" are to be substituted for the words "Judicial Commissioner of Sind" when the Sind Courts (Supplementary) Act, 1926 (34 of 1926), comes into force.

(v) These words were added by the Insolvency Law (Amendment) Act, 1930 (10 of 1930).

(w) These words were substituted for the words "that office" by the Insolvency Law (Amendment) Act, 1930 (10 of 1930).

(z) This sub-section was inserted by the Insolvency Law (Amendment) Act, 1930 (10 of 1930).

(y) These words were added by the Insolvency Law (Amendment) Act, 1930 (10 of 1930).

(a) Coll. State., Vol. I.

(a) Bur. Code.

79. (1) The duties of an official assignee shall have relation to the conduct of the insolvent as well as to the administration of his estate.

**P.-A. I. A.
ss. 73-83**

(2) In particular it shall be the duty of the official assignee—

- (a) to investigate the conduct of the insolvent and to report to the Court upon any application for discharge, stating whether there is reason to believe that the insolvent has committed any act which constitutes an offence under this Act or under sections 421 to 424 of the Indian Penal Code in connection with his insolvency or which would justify the Court in refusing, suspending or qualifying an order for his discharge;
- (b) to make such other reports concerning the conduct of the insolvent as the Court may direct or as may be prescribed; and
- (c) to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct or as may be prescribed.

Parallel enactments.—B.A., 1883, ss. 68 (1), 69; B.A., 1914, ss. 72 (1), 73.

Duties as regards insolvent's conduct.—P. 514, para. 752.

80. The official assignee shall, whenever required by any creditor so to do and on payment by the creditor of the prescribed fee, furnish and send to the creditor by post a list of the creditors showing in the list the amount of the debt due to each of the creditors.

Duty to furnish list of
creditors.

Parallel enactments.—B.A., 1883, s. 79; B.A., 1914, s. 84.

81. (1) Such remuneration shall be paid to the official assignee as may be prescribed.

Remuneration.

(2) No remuneration whatever beyond that referred to in subsection (1) shall be received by an official assignee as such.

Parallel enactments.—B.A., 1883, s. 72; B.A., 1914, s. 82; Prov. I. A., ss. 56 (2) (b), 57 (4).

Remuneration of Official Assignee.—P. 515, para. 754.

82. The Court shall call the official assignee to account for any misfeasance, neglect or omission which may appear in his accounts or otherwise, and may require the official assignee to make good any loss which the estate of the insolvent may have sustained by reason of the misfeasance, neglect or omission.

Misfeasance.

Parallel enactments.—B.A., 1883, s. 81 (2); B.A., 1914, s. 87 (2); Prov. I. A., s. 56 (4).

Misfeasance.—P. 516, para. 755.

83. The official assignee may sue and be sued by the name of "the official assignee of the property of _____, an insolvent," inserting the name of the insolvent, and by that name may hold property of every description, make contracts, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

Name under which to
sue or be sued.

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ss. 83-87**

Parallel enactments.—B.A., 1883, s. 83; B.A., 1914, s. 76.

Suit by creditor in name of Official Assignee on indemnity.—P. 497, para. 695.

Name under which to sue or be sued.—P. 516, para. 756.

84. If an order of adjudication is made against an official assignee, he shall thereby vacate the office of official assignee.
Office vacated by insolvency.

Parallel enactments.—B.A., 1883, s. 85; B.A., 1914, s. 94.

85. (1) Subject to the provisions of this Act and to the directions of the Court, the official assignee shall, in the administration of the property of the insolvent and in the distribution thereof amongst his creditors, have regard to any resolution that may be passed by the creditors at a meeting.
Discretionary powers and control thereof.

(2) The official assignee may, from time to time, summon meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution at any meeting, or the Court may direct, or whenever requested in writing to do so by one-fourth in value of the creditors who have proved.

(3) The official assignee may apply to the Court for directions in relation to any particular matter arising under the insolvency.

(4) Subject to the provisions of this Act, the official assignee shall use his own discretion in the management of the estate and its distribution among the creditors.

Parallel enactments.—B.A., 1883, s. 89; B.A., 1914, s. 79.

Official Assignee to have regard to directions of creditors.—P. 516, para. 758.

Discretionary powers of Official Assignee.—P. 517, para. 759.

86. If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the official assignee, he may appeal to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just.
Appeal to Court.

Parallel enactments.—B.A., 1883, s. 90; B.A., 1914, s. 80; Prov. I. A., 68.

Appeal from decision of Official Assignee to Court.—P. 539, para. 805.

Parallel enactments.—P. 539, para. 806.

Limitation for appeal against Official Assignee.—P. 540, para. 807.

Who may appeal.—P. 540, para. 808.

The insolvent.—P. 540, para. 809.

Creditor.—P. 540, para. 809A.

Any other person aggrieved.—P. 540, para. 810.

Seizure of property of third person by Official Assignee.—P. 540, para. 811.

87. (1) If any official assignee does not faithfully perform his duties and duly observe all the requirements imposed on him by any enactment, rules or otherwise, with respect to the performance of his duties, or if any complaint is made to the Court by any creditor in regard thereto, the Court shall enquire into the matter and take such action thereon as may be deemed expedient.
Control of Court.

(2) The Court may at any time require any official assignee to answer any enquiry made by it in relation to any insolvency in which he is engaged, and may examine him or any other person on oath concerning the insolvency. **P.A. I. A. ss. 87-90**

(3) The Court may also direct an investigation to be made of the books and vouchers of the official assignee.

Parallel enactments.—B.A., 1883, s. 91 ; B.A., 1914, s. 81 ; Prov. I. A., s. 56 (4).

PART V.

COMMITTEE OF INSPECTION.

88. The Court may, if it so thinks fit, authorize the creditors who have proved to appoint from among the creditors or holders of general proxies or general powers-of-attorney from such creditors, a committee of inspection for the purpose of superintending the administration of the insolvent's property by the official assignee :

Committee of inspection.

Provided that a creditor, who is appointed a member of a committee of inspection, shall not be qualified to act until he has proved.

Parallel enactments.—B.A., 1883, s. 22 (1); B.A., 1914, s. 20 (1); Prov. I. A., s. 67A.

Committee of inspection.—P. 497, para. 720.

89. The committee shall have such powers of control over the proceedings of the official assignee as may be prescribed.

Control of committee of inspection over official assignee.

Parallel enactments.—Prov. I. A., s. 67A.

PART VI.

PROCEDURE.

90. (1) In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction.

Powers of the Court.

Provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act.

(2) Subject to the provisions of this Act and rules, the costs of and incidental to any proceedings in the Court shall be in the discretion of the Court.

(3) The Court may at any time adjourn any proceedings before it upon such terms, if any, as it thinks fit to impose.

(4) The Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it thinks fit to impose.

(5) Where by this Act or by rules the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court thinks fit to impose.

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ss. 90-93

(6) Subject to rules, the Court may in any matter take the whole or any part of the evidence either *viva voce* or by interrogatories, or upon affidavit, or by commission.

(7) For the purpose of approving a composition or scheme by joint debtors the Court may, if it thinks fit, and on the report of the official assignee that it is expedient so to do, dispense with the public examination of one of the joint debtors if he is unavoidably prevented from attending the examination by illness or absence abroad.

(8) For the purposes of this Act the (b) [Court of the Judicial Commissioner of Sind] shall have all the powers to punish for contempt of Court which are possessed by the High Courts of Judicature at Fort William, Madras and Bombay respectively.

Parallel enactments.—B.A., 1883, s. 105; B.A., 1914, s. 109; Prov. I. A., ss. 5, 24 (3).

General powers of Court.—P. 55, para. 71.

Transfer of proceedings.—P. 55, para. 72.

Stay of proceedings.—P. 56, para. 73.

Injunction.—P. 56, para. 74.

Section does not affect jurisdiction of the Court.—P. 56, para. 75.

Costs.—P. 568, para. 848.

Costs of Official Assignee.—P. 568, para. 849.

Insolvency rules as to costs of Official Assignee.—P. 570, para. 850.

Costs in other matters.—P. 570, para. 851.

91. Where two or more insolvency petitions are presented against the same debtor or against joint debtors, or where joint debtors file separate petitions, the Court may consolidate the proceedings or any of them on such terms as the Court thinks fit.

Consolidation of petitions

Parallel enactments.—B.A., 1883, s. 106; B.A., 1914, s. 110; Prov. I. A., s. 15.

Consolidation of petitions.—P. 154, para. 229.

92. Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in the case of a petitioning creditor.

Power to change carriage of petition.

Parallel enactments.—B.A., 1883, s. 107; B.A., 1914, s. 111; Prov. I. A., s. 16.

Power to change carriage of petition.—P. 154, para. 230.

93. If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive.

Continuance of proceedings on death of debtor.

Parallel enactments.—B.A., 1883, s. 108; B.A., 1914, s. 112; Prov. I. A., s. 17.

Continuance of proceedings on death of debtor.—P. 155, para. 221.

(b) These words were substituted for the words "Chief Court of Lower Burma" by s. 8 of the Insolvency (Amendment) Act, 1926 (9 of 1926) and the words "Chief Court of Sind" are to be substituted for the words "Court of the Judicial Commissioner of Sind" when the Sind Court (Supplementary) Act, 1926 (34 of 1926) comes in force.

- 94.** The Court may, at any time, for sufficient reason, make an order staying the proceedings under an insolvency petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court thinks just

**P.-t. L.A.
ss. 94-98**

Power to stay proceedings.

Parallel enactments.—B.A., 1883, s. 109; B.A., 1914, s. 113.

Power to stay proceedings.—P. 157, para. 233.

- 95.** Any creditor whose debt is sufficient to entitle him to present an insolvency petition against all the partners in a firm may present a petition against any one or more partners in the firm without including the others.

Power to present petition against a partner.

Parallel enactments.—B.A., 1883, s. 110; B.A., 1914, s. 114.

Partners : firm.—P. 70, para. 90.

- 96.** Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them.

Power to dismiss petition against some respondents only.

Parallel enactments.—B.A., 1883, s. 111; B.A., 1914, s. 115.

Power to dismiss petition against some respondents.—P. 157, para. 232.

- 97.** Where an order of adjudication has been made on an insolvency petition against or by one partner in a firm, any other insolvency petition against or by a partner in the same firm shall be presented in or transferred to the Court in which the first-mentioned petition is in course of prosecution ; and such Court may give such directions for consolidating the proceedings under the petitions as it thinks just.

Separate insolvency petitions against partners.

Parallel enactments.—B.A., 1883, s. 112; B.A., 1914, s. 116.

Consolidation of petitions against partners.—P. 154, para. 220A.

- 98.** (1) Where a partner in a firm is adjudged insolvent, the Court may authorize the official assignee to continue or commence and carry on any suit or other proceeding in his name and that of the insolvent's partner, and any release by the partner of the debt or demand to which the proceeding relates shall be void.

Suits by official assignee and insolvent's partners.

- (2) Where application for authority to continue or commence any suit or other proceeding has been made under sub-section (1), notice of the application shall be given to the insolvent's partner and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the proceeding, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs.

Parallel enactments.—B.A., 1883, s. 113; B.A., 1914, s. 117.

Suits by Official Assignee and insolvent's partners.—P. 490, para. 701.

P.-t. I. A.
ss. 99-102

99. (1) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm

Proceedings in partnership name.

Provided that in that case the Court may, on application by any person interested, order the names of the persons who are partners in the firm, or the name of the person carrying on business under a partnership name, to be disclosed in such manner and verified on oath or otherwise, as the Court may direct.

(2) In the case of a firm in which one partner is an infant, an adjudication order may be made against the firm other than the infant partner.

Parallel enactments.—B.A., 1883, s. 115; B.A., 1914, s. 119; Prov. I. A., s. 79

(2) (c).

Partners : Firm.—P. 70, para. 90.

100. (1) A warrant of arrest issued by the Court may be executed in the same manner and subject to the same conditions as a warrant of arrest issued under the Code of Criminal Procedure, 1898, may be executed.

Warrants of Insolvency Courts.

(2) A warrant to seize any part of the property of an insolvent, issued by the Court under section 59, sub-section (1), shall be in the form prescribed, and sections 77 (2), 79, 82, 83, 84 and 102 of the said Code shall, so far as may be, apply to the execution of such warrant.

(3) A search-warrant issued by the Court under section 59, sub-section (2), may be executed in the same manner and subject to the same conditions as a search-warrant for property supposed to be stolen may be executed under the said Code.

Parallel enactments.—B.A., 1883, s. 119; B.A., 1914, s. 123.

PART VII.

LIMITATION.

101. The period of limitation for an appeal from any act or decision of the official assignee or from an order made by an officer of the Court empowered under section 6 shall be twenty days from the date of such act, decision or order, as the case may be.

Limitation of appeals.

Parallel enactments.—B.A., 1914, s. 108 (3); Prov. I. A., s. 68 proviso.

Limitation for appeal against Official Assignee.—P. 540, para. 807.

PART VIII.

PENALTIES.

102. An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

Undischarged insolvent obtaining credit.

Parallel enactments.—B.A., 1883, s. 31; B.A., 1914, s. 155; Prov. I. A., s. 72.

Offence by undischarged insolvent.—P. 505, para. 737.

Undischarged insolvent obtaining credit.—P. 506, para. 738.

Jurisdiction of Magistrates.—P. 506, para. 739.

Part I. A.
ss. 102-103A

103. Any person adjudged insolvent who—

(a) fraudulently with the intent to conceal the state of his affairs or to defeat the objects of this Act,

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any books, paper or writing relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from, or wilfully altered or falsified, any book, paper or writing relating to such of his affairs as are subject to investigation under this Act, or

(b) fraudulently with intent to diminish the sum to be divided amongst his creditors or of giving an undue preference to any of the said creditors,

(i) has discharged or concealed any debt due to or from him, or

(ii) has made away with, charged, mortgaged or concealed any part of his property of what kind soever,

shall on conviction be punishable with imprisonment for a term which may extend to two years.

Parallel enactments.—Prov. I. A., s. 69.

English law.—P. 498, para. 721.

Insolvency offences under the Indian law.—P. 499, paras. 722 and 723.

Failure to perform duties imposed on insolvent.—P. 500, para. 724.

Withholding or preventing production of books or documents.—P. 500 para. 725.

Omission to make entries.—P. 501, para. 726.

Giving undue preference.—P. 501, para. 727.

Fraudulently making way with property.—P. 501, para. 728.

Burden of proof.—P. 501, para. 729.

When the offence must have been committed.—P. 502, para. 730.

Effect of offences on discharge.—P. 502, para. 731.

(c) [103A. (1) Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

Disqualifications of insolvent.

(a) being appointed or acting as a Magistrate ;

(b) being elected to any office of any local authority where the appointment to such office is by election, or holding or exercising any such office to which no salary is attached ; and

P. & I. A.
ss. 103-105

- (c) being elected or sitting or voting as a member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

- (a) the order of adjudication is annulled under sub-section (1) of section 21, or

- (b) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.

- (3) The Court may grant or refuse such certificate as it thinks fit.]

Parallel enactments.—Prov. I. A., s. 73.

Disqualification of insolvent.—P. 190, para. 274.

Insolvency caused by misfortune without misconduct.—P. 190, para. 275.

(d) [104. (1) Where the Court is satisfied, after such preliminary inquiry, if any, as it thinks necessary, that there is ground for inquiring into any offence referred to in section 103 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Presidency Magistrate or a Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.

Procedure on charge
under section 103.

(2) Any complaint made by the Court under sub-section (1) may be signed by such officer of the Court as the Court may appoint in this behalf.]

Parallel enactments.—Prov. I. A., s. 70.

Complaint by Court.—P. 502, para. 732.

Changes in the law.—P. 503, para. 733.

Preliminary inquiry.—P. 504, para. 734.

At what stage preliminary inquiry to be held.—P. 505, para. 735.

Commitment to High Court Sessions.—P. 505, para. 736.

Offences which can be committed by the insolvent or others.—P. 507, para. 740.

Offences which can be committed by any person other than the bankrupt.—P. 507, para. 741.

105. Where an insolvent has been guilty of any of the offences specified in section 102 or section 103, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.

Criminal liability after
discharge or composi-
tion.

Parallel enactments.—B.A., 1883, s. 167; B.A., 1914, s. 162; Prov. I. A., s. 71.

Criminal liability after discharge or composition.—P. 507, para. 742.

(d) This section was substituted by s. 9 of the Insolvency (Amendment) Act, 1926 (9 of 1926).

PART IX.**SMALL INSOLVENCIES.**

106. (1) Where the Court is satisfied by affidavit or otherwise, or the official assignee reports to the Court, that the property of an insolvent is not likely to exceed in value three thousand rupees or such other less amount as may be prescribed, the Court may make an order that the insolvent's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications, namely :

Summary administration in small cases.

**P.-t. I. A.
ss. 106-108**

- (a) no appeal shall lie from any order of the Court, except by leave of the Court ;
- (b) no examination of the insolvent shall be held except on the application of a creditor or the official assignee ;
- (c) the estate shall, where practicable, be distributed in a single dividend ;
- (d) such other modifications as may be prescribed with the view of saving expense and simplifying procedure :

Provided that nothing in this section shall permit the modification of the provisions of this Act relating to the discharge of the insolvent.

(2) The Court may at any time, if it thinks fit, revoke an order for the summary administration of an insolvent's estate.

Parallel enactments.—B.A., 1883, s. 121 ; B.A., 1914, s. 129 ; Prov. I. A., s. 74.

Summary administration in small insolvencies.—P. 509, para. 743

PART X.**SPECIAL PROVISIONS.**

107. No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force.

Exemption of corporation, etc., from insolvency proceedings.

Parallel enactments.—B.A., 1883, s. 123 ; B.A., 1914, s. 126 ; Prov. I. A., s. 8.

Corporations and registered companies.—P. 73A, para. 92.

108. (1) Any creditor of a deceased debtor whose debt would have been sufficient to support an insolvency petition against the debtor, had he been alive, may present to the Court within the limits of whose ordinary original civil jurisdiction the debtor resided or carried on business for the greater part of the six months immediately prior to his decease, a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor under this Act.

Administration in insolvency of estate of person dying insolvent.

P.A.I.A.
ss. 108, 109

(2) Upon the prescribed notice being given to the legal representative of the deceased debtor, the Court may, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in insolvency of the deceased debtor's estate, or may upon cause shown dismiss the petition with or without costs.

(3) A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate but that Court may in that case, on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in insolvency under this Act, and thereupon the last-mentioned Court may make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor.

Parallel enactments.—B.A., 1883, s. 125; B.A., 1914, s. 130.

Deceased insolvent debtors.—P. 511, para. 745.

Vesting of estate and mode of administration.—P. 512, para. 746.

109. (1) Upon an order being made for the administration of a deceased debtor's estate under section 108, the property of the debtor shall vest in the official assignee of the Court, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act.

Vesting of estate and
mode of adminis-
tration.

(2) With the modification hereinafter mentioned, all the provisions of Part III, relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to the case of such administration order in like manner as to an order of adjudication under this Act.

(3) In the administration of the property of the deceased debtor under an order of administration, the official assignee shall have regard to any claims by the legal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate; and those claims shall be deemed a preferential debt under the order, and be payable in full, out of the debtor's estate, in priority to all other debts.

(4) If, on the administration of a deceased debtor's estate, any surplus remains in the hands of the official assignee after payment in full of all the debts due from the debtor together with the costs of the administration and interest as provided by this Act in case of insolvency, such surplus shall be paid over to the legal representative of the deceased debtor's estate, or dealt with in such other manner as may be prescribed.

Parallel enactments.—B.A., 1883, s. 125 (5) to (8); B.A., 1914, s. 130 (4) to (7).

110. (1) After notice of the presentation of a petition under section 108 no payment or transfer of property made by the legal representative shall operate as a discharge to him as between himself and the official assignee. **P.-t. I. A. ss. 110-112**

Payments or transfer
by legal representatives.

(2) Save as aforesaid nothing in section 108 or section 109 or this section shall invalidate any payment made or act or thing done in good faith by the legal representative or by a District Judge acting under the powers conferred on him by section 64 of the Administrator General's Act, 1874, before the date of the order for administration.

Parallel enactments.—B.A., 1883, s. 125 (9); B.A., s. 130 (8).

Payment or transfer by legal representative.—P. 513, para. 747.

111. The provisions of sections 108, 109 and 110 shall not apply to any case in which probate or letters of administration to the estate of a deceased debtor have been granted to an Administrator-General.

Saving of jurisdiction
of Administrator-Gen-
eral.

PART XI.

RULES.

112. (1) The Court having jurisdiction under this Act may from time to time make rules (e) for carrying into effect the objects of this Act.

Rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for and regulate—

- (a) the fees and percentages to be charged under this Act and the manner in which the same are to be collected and accounted for and the account to which they are to be paid ;
- (b) the investment, whether separately or collectively, of unclaimed dividends, balances and other sums appertaining to the estates of insolvent debtors whether adjudicated insolvent under this or any former enactment, and the application of the proceeds of such investment,
- (c) the proceedings of the official assignee in taking possession of and realising the estates of insolvent debtors ;
- (d) the remuneration of the official assignee ;
- (e) the receipts, payments and accounts of the official assignee ;
- (f) the audit of the accounts of the official assignee ;
- (g) the payment of the remuneration of the official assignee, of the costs, charges and expenses of his establishment, and of the costs of the audit of his accounts out of the proceeds of the investments in his hands ;

(e) For rules by the High Courts, see High Court Rules and Orders of different provinces.

**P.t. I. A.
ss. 112-114**

- (h) the payment of the costs incurred in the prosecution of fraudulent debtors and in legal proceedings taken by the official assignee, under the direction of the Court out of the proceeds aforesaid ;
- (i) the payment of any civil liability incurred by an official assignee acting under the order or direction of the Court ;
- (j) the proceedings to be taken in connection with proposals for composition and schemes of arrangement with the creditors of insolvent debtors ;
- (k) the intervention of the official assignee at the hearing of applications and matters relating to insolvent debtors and their estates ;
- (f) [(kk) filing of lists of creditors and debtors and the affording of assistance to the Court by a petitioning debtor ;]
- (l) the examination by the official assignee of the books and papers of account of undischarged insolvent debtors ;
- (m) the service of notices in proceedings under this Act ;
- (n) the appointment, meetings and procedure of committees of inspection ;
- (o) the conduct of proceedings under this Act in the name of a firm ;
- (p) the forms to be used in proceedings under this Act ;
- (q) the procedure to be followed in the case of estates to be administered in a summary manner ;
- (r) the procedure to be followed in the case of estates of deceased persons to be administered under this Act ;
- (g) [(s) the distribution of work between the official assignee and his deputy or deputies.]

Parallel enactments.—B.A., 1883, s. 127 (1) ; B.A., 1914, s. 132 (1) ; Prov. I. A. s. 79 (1) (2).

Power to make rules.—P. 570, para. 852.

113. Rules made under the provisions of this Part shall be subject, in the case of the High Court of Judicature at Fort William in Bengal, to the previous sanction of the Governor General in Council, and, in the case of any other Court, of the Local Government.

114. Rules so made and sanctioned shall be published in the “ Gazette of India ” or in the local official Gazette, as the case may be, and shall thereupon have the same force and effect with regard to proceedings under this Act in the Court which made them as if they had been enacted in this Act.

Parallel enactments.—Prov. I. A., s. 79 (3).

(f) This clause was inserted by s. 5 of the Presidency-towns Insolvency (Amendment) Act, 1927 (19 of 1927).

(g) This clause was inserted by the Insolvency Law (Amendment) Act, 1930 (10 of 1930).

PART XII.

SUPPLEMENTAL.

115. (1) Every transfer, mortgage, assignment, power-of-attorney, proxy paper, certificate, affidavit, bond or other proceedings, instrument or writing whatsoever before or under any order of the Court, and any copy thereof shall be exempt from payment of any stamp or other duty whatsoever. **P.-t. I. A. ss. 115-117**

Exemption from duty of transfers, etc., under this Act.

(2) No stamp-duty or fee shall be chargeable for any application made by the official assignee to the Court under this Act, or for the drawing and issuing of any order made by the Court on such application.

Parallel enactments.—B.A., 1883, s. 144; B.A., 1914, s. 148.

Exemption from duty of transfers, etc.—P. 572, para. 858.

116. (1) A copy of the official Gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice.

The Gazette to be evidence.

(2) A copy of the official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date.

Parallel enactments.—B.A., 1883, s. 132; B.A., 1914, s. 137.

Gazette to be evidence of order of adjudication.—P. 129, para. 180.

Appeal against order of adjudication.—P. 529, para. 788.

The Gazette to be evidence.—P. 573, para. 859.

117. Any affidavit may be used in a Court having jurisdiction under this Act if it is sworn—

Swearing of affidavits.

(a) in British India, before—

(i) any Court or Magistrate, or

(ii) any officer or other person appointed to administer oaths under the Code of Civil Procedure, 1908;

(b) in England, before any person authorized to administer oaths in His Majesty's High Court of Justice, or in the Court of Chancery of the County Palatine of Lancaster, or before any Registrar of a Bankruptcy Court, or before any officer of a Bankruptcy Court authorized in writing in that behalf by the Judge of the Court or before a Justice of the Peace for the county or place where it is sworn;

(c) in Scotland or in Ireland, before a Judge Ordinary, Magistrate or Justice of the Peace and,

(d) in any other place, before a Magistrate or Justice of the Peace or other person qualified to administer oaths in that place (he being certified to be a Magistrate or Justice of the Peace, or qualified as aforesaid, by a British Minister or British Consul or British Political Agent or by a notary public).

P.t. I. A.
ss. 118-122

118. (1) No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

Formal defect not to invalidate proceedings.

(2) No defect or irregularity in the appointment of an official assignee or member of a committee of inspection shall vitiate any act done by him in good faith.

Parallel enactments.—B.A., 1883, s. 143 ; B.A., 1914, s. 147.

Formal defect not to invalidate proceedings.—P. 574, para. 861.

119. Where an insolvent is a trustee within the Indian Trustee Act, 1866, section 35 of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the insolvent (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly.

Application of Trustee Act to insolvency of trustee.

Insolvency of trustee.—P. 191, para. 275A.

120. Save as herein provided, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown.

Certain provisions to bind the Crown.

Parallel enactments.—B.A., 1883, s. 150 ; B.A., 1914, s. 151.

What debts sec. 30 includes.—P. 253, para. 378.

Certain provisions to bind the Crown.—P. 574, para. 862.

121. Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the Relief of Insolvent Debtors.

Saving for existing rights of audience.

Parallel enactments.—B.A., 1883, s. 151 ; B.A., 1914, s. 152.

Rights of audience.—P. 574, para. 863.

122. Where the official assignee has under his control any dividend which has remained unclaimed for fifteen years from the date of declaration or such less period as may be prescribed, he shall pay the same to the account and credit of the Government of India, unless the Court otherwise directs.

Lapse and credit to Government of unclaimed dividends.

Parallel enactments.—B.A., 1883, s. 162 (1) (2) ; B.A., 1914, s. 153.

123. Any person claiming to be entitled to any monies paid to the account and credit of the Government of India under section 122, may apply to the Court for an order for payment to him of the same; and the Court, if satisfied that the person claiming is entitled, shall make an order for payment to him of the sum due :

Claims to monies credited to Government under section 122.

**P.-t. I. A.
ss. 123-127**

Provided that, before making an order for the payment of a sum which has been carried to the account and credit of the Government of India, the Court shall cause a notice to be served on such officer as the Governor General in Council may appoint in this behalf calling on the officer to show cause, within one month from the date of the service of the notice, why the order should not be made.

Parallel enactments.—B.A., 1883, s. 162 (4); B.A., 1914, s. 153 (4).

124. (1) No person shall, as against the official assignee, be entitled to withhold possession of the books of accounts belonging to the insolvent or to set up any lien thereon.

Access to insolvent's books.

(2) Any creditor of the insolvent may, subject to the control of the Court, and on payment of such fee, if any, as may be prescribed, inspect at all reasonable times, personally or by agent, any such books in the possession of the official assignee.

Possession of property by Official Assignee.—P. 473, para. 680.

125. Such fees and percentages shall be charged for and in respect of proceedings under this Act as may be prescribed.

Fees and percentages.

126. All Courts having jurisdiction under this Act shall make such orders and do such things as may be necessary to give effect to section 118 of the (h) Bankruptcy Act, 1883, and to section 50 of the Provincial Insolvency Act, 1907.

Courts to be auxiliary to each other.

Parallel enactments.—B.A., 1883, s. 118; B.A., 1914, s. 122; Prov. I. A., s. 77.

Courts to be auxiliary to each other.—P. 58, para. 80.

Orders in aid.—P. 60, para. 81.

127. (i) (1) * * * * *

(i) (2) * * * The proceedings under an insolvency petition under the Indian Insolvency Act, 1848, pending at the commencement of this Act shall except, so far as any provisions of this Act is expressly applied to pending proceedings, continue, and all the provisions of the said Indian Insolvency Act shall, except as aforesaid, apply thereto, as if this Act had not been passed.

Saving.

(h) Coll. Stats., Vol. II.

(i) Section 127, sub-section (1) and the words: "Notwithstanding the repeal effected by this Act" in sub-section (2) were repealed by s. 3 and Sch. II of the Repealing and Amending Act, 1914 (10 of 1914).

THE FIRST SCHEDULE.*(See section 26.)***MEETINGS OF CREDITORS.****Sch. I**

1. The official assignee may at any time summon a meeting of creditors, and shall do so whenever so directed by the Court or by the creditors by resolution at any meeting or whenever requested in writing by one-fourth in value of the creditors who have proved.

Meetings of creditors.

Parallel enactments.—This Schedule is based on Sch. I to the Bankruptcy Act, 1883. See now B.A., 1914, Sch. I. See Comparative Table on p. 711.

2. Meetings shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or, if he has not proved, at the address given in the insolvent's schedule, or such other address as may be known to the official assignee.

Summoning of meetings.

3. The notice of any meeting shall be sent off not less than seven days before the day appointed for the meeting and may be delivered personally or sent by prepaid post letter, as may be convenient. The official assignee may, if he thinks fit, also publish the time and place of any meeting in any local newspaper or in the local official Gazette.

Notice of meetings.

4. It shall be the duty of the insolvent to attend any meeting which the official assignee may, by notice, require him to attend, and any adjournment thereof. Such notice shall be either delivered to him personally or sent to him at his address by post at least three days, before the date fixed for the meeting.

Duty of insolvent to attend if required.

5. The proceedings held and resolutions passed at any meeting shall unless the Court otherwise orders, be valid notwithstanding that any creditor has not received the notice sent to him.

Proceedings not to be avoided for non-receipt of notice.

6. A certificate of the official assignee that the notice of any meeting has been duly given shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

Proof of issue of notice.

7. Where on the request of creditors the official assignee summons a meeting, there shall be deposited with the written request the sum of five rupees for every twenty creditors for the costs of summoning the meeting, including all disbursements:

Costs of meeting.

Provided that the official assignee may require such further sum to be deposited as in his opinion shall be sufficient to cover the costs and expenses of the meeting.

Sch.

Chairman. 8. The official assignee shall be the chairman of any meeting.

9. A creditor shall not be entitled to vote at a meeting unless he has duly proved a debt provable in insolvency to be due to him from the insolvent, and the proof has been duly lodged one clear day before the time appointed for the meeting.

Right to vote.

10. A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained.

No vote in respect of certain debts.

No vote in respect of certain debt.—P. 196, para. 282.

11. For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of this security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

Secured creditor.

Secured creditor.—P. 196, para. 282.

12. Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the insolvent is liable, such bill of exchange, note, instrument or security must, subject to any special order of the Court made to the contrary, be produced to the official assignee before the proof can be admitted for voting.

Proof in respect of negotiable instruments.

13. It shall be competent to the official assignee, within twenty-eight days after a proof estimating the value of a security has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally, on payment of the value so estimated.

Power to require creditor to give up security.

14. If one partner in a firm is adjudged insolvent, any creditor to whom that partner is indebted jointly with the other partners in the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors and shall be entitled to vote thereat.

Proof by partner.

Sch. I

15. The official assignee shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether the proof of a creditor should be admitted or rejected, he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

Power of official assignee to admit or reject proof.

Proxy. 16. A creditor may vote either in person or by proxy.

17. Every instrument of proxy shall be in the prescribed form and shall be issued by the official assignee.

Instrument of proxy.

18. A creditor may give a general proxy to his attorney or to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

General proxy.

19. A proxy shall not be used unless it is deposited with the official assignee one clear day before the time appointed for the meeting at which it is to be used.

Proxy to be deposited one day before date of meeting.

20. A creditor may appoint the official assignee to act as his proxy.

Official assignee as proxy.

21. The official assignee may adjourn the meeting from time to time and from place to place, and no notice of the adjournment shall be necessary.

Adjournment of meeting.

22. The official assignee shall draw up a minute of the proceedings at the meeting and shall sign the same.

Minute of proceedings.

THE SECOND SCHEDULE.

(See section 48.)

PROOF OF DEBTS.

Proofs in ordinary cases.

Sch. II

1. Every creditor shall lodge the proof of his debt as soon as may be after the making of an order of adjudication.

Time for lodging proof.

Parallel enactments.—B.A., 1883, Sch. II, r. 1; B.A., 1914, Sch. II, r. 1; Prov. I.A., s. 33.

Time for lodging proof.—P. 294, para. 446.

2. A proof may be lodged by delivering or sending by post in a registered letter to the official assignee an affidavit verifying the debt.

Mode of lodging proof.

Parallel enactments.—B.A., 1883, Sch. II, r. 2 ; B.A., 1914, Sch. II, r. 2 ; Prov. I. A., s. 49. **Sch. II**

3. The affidavit may be made by the creditor himself or by some person authorized by or on behalf of the creditor.

Authority to make affidavit.

If made by a person so authorized, it shall state his authority and means of knowledge.

Parallel enactments.—B.A., 1883, Sch. II, r. 3 ; B.A., 1914, Sch. II, r. 3.

4. The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated.

Contents of affidavit.

The official assignee may at any time call for the production of the vouchers.

Parallel enactments.—B.A., 1883, Sch. II, r. 4 ; B.A., 1914, Sch. II, r. 4.

5. The affidavit shall state whether the creditor

Affidavit to state if creditor holds security.

is or is not a secured creditor.

Parallel enactments.—B.A., 1883, Sch. II, r. 5 ; B.A., 1914, Sch. II, r. 5.

6. A creditor shall bear the cost of proving his debt unless the Court otherwise specially orders.

Cost of proving debts.

Parallel enactments.—B.A., 1883, Sch. II, r. 6 ; B.A., 1914, Sch. II, r. 6.

Costs of proving debts.—P. 295, para. 446.

7. Every creditor who has lodged a proof shall be entitled to see and

Right to see and examine proof.

examine the proofs of other creditors at all reasonable times.

Parallel enactments.—B.A., 1883, Sch. II, r. 7 ; B.A., 1914, Sch. II, r. 7.

8. A creditor in lodging his proofs shall deduct from his debt all trade discount, but he shall not be compelled to

Deduction to be made from proof.

deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have

agreed to allow for payment in cash.

Parallel enactments.—B.A., 1883, Sch. II, r. 8 ; B.A., 1914, Sch. II, r. 8.

Proof by secured creditors.

9. If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.

Proof where security realized.

Parallel enactments.—B.A., 1883, Sch. II, r. 9 ; B.A., 1914, Sch. II, r. 10.

Rights of secured creditors in general.—P. 298, para. 450.

Proof by secured creditors.—P. 298, para. 451.

Realisation.—P. 298, para. 452.

Sch. II

10. If a secured creditor surrenders his security to the official assignee for the general benefit of the creditors, he may prove for his whole debt.

Proof where security is surrendered.

Parallel enactments.—B.A., 1883, Sch. II, r. 10; B.A., 1914, Sch. II, r. 11.

Surrender.—P. 299, para. 453.

11. If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

Proof in other cases.

Parallel enactments.—B.A., 1883, Sch. II, r. 11; B.A., 1914, Sch. II, r. 12.

Assessment of value.—P. 299, para. 454.

12. (1) Where a security is so valued the official assignee may at any time redeem it on payment to the creditor of the assessed value.

Valuation of security.

(2) If the official assignee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the official assignee, or as, in default of agreement, the Court may direct. If the sale is by public auction, the creditor, or the official assignee on behalf of the estate, may bid or purchase :

Provided that the creditor may at any time, by notice in writing, require the official assignee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the official assignee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the official assignee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

Parallel enactments.—B.A., 1883, Sch. II, r. 12; B.A., 1914, Sch. II, r. 13.

Assessment of value.—P. 299, para. 454.

Rights of secured creditor and Official Assignee in respect of securities valued by creditor.—P. 301, para. 458.

13. Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the official assignee, or the Court, that the valuation and proof were made *bona fide* on a mistaken estimate, or that the security has diminished or increased in

Amendment of valuation.

value since its previous valuation ; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the official assignee shall allow the amendment without application to the Court.

Parallel enactments.—B.A., 1883, Sch. II, r. 13 ; B.A., 1914, Sch. II, r. 14.

Amendment where valuation made on a mistaken estimate.—P. 300, para. 455.

14. Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he has received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend which he has failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

Refund or excess received.

Parallel enactments.—B.A., 1883, Sch. II, r. 14 ; B.A., 1914, Sch. II, r. 15.

Amendment where valuation made on a mistaken estimate.—P. 300, para. 455.

15. If a creditor after having valued his security subsequently realizes it, or if it is realized under the provisions of rule 12, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor.

Amendment where security subsequently realized.

Parallel enactments.—B.A., 1883, Sch. II, r. 15 ; B.A., 1914, Sch. II, r. 16.

Amendment where security subsequently realised.—P. 301, para. 456.

16. If a secured creditor does not comply with the foregoing rules, he shall be excluded from all share in any dividend.

Exclusion from sharing in dividend.

Parallel enactments.—B.A., 1883, Sch. II, r. 16 ; B.A., 1914, Sch. II, r. 17.

17. Subject to the provisions of rule 12, a creditor shall in no case receive more than sixteen annas in the rupee and interest as provided by this Act.

Limit of receipt.

Parallel enactments.—B.A., 1883, Sch. II, r. 16 ; B.A., 1914, Sch. II, r. 18.

Limit of receipt.—P. 302, para. 459.

Faking Accounts of Property Mortgaged, and of the Sale thereof.

18. Upon application by any person claiming to be a mortgagee of any part of the insolvent's real or leasehold estate and whether such mortgage is by deed or otherwise, and

Inquiry into mortgage, etc.

Sch. II whether the same is of a legal or equitable nature, or upon application by the official assignee with the consent of such person claiming to be a mortgagee as aforesaid, the Court shall proceed to inquire whether such person is such mortgagee, and for what consideration and under what circumstances; and if it is found that such person is such mortgagee, and if no sufficient objection appears to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, and of the rents and profits, or dividends, interest or other proceeds received by such person or by any other person by his order or for his use in case he has been in possession of the property over which the mortgage extends, or any part thereof, and the Court, if satisfied that there ought to be a sale, shall direct notice to be given in such newspapers as the Court thinks fit, when and where, and by whom and in what way the said premises or property, or the interest therein so mortgaged, are to be sold, and that such sale be made accordingly, and that the official assignee (unless it is otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application. At any such sale the mortgagee may bid and purchase.

Special rules for inquiry into mortgage and for sale of mortgaged property.—P. 302, para. 460.

19. All proper parties shall join in the conveyance to the purchaser, as the Court directs.

Conveyances.

20. The moneys to arise from such sale shall be applied, in the first place, in payment of the costs, charges and expenses of and occasioned by the application to the Court, and of such sale and the commission (if any) of the official assignee, and in the next place in payment and satisfaction, so far as the same extend, of what shall be found due to such mortgagee, for principal, interest and costs, and the surplus of the sale moneys (if any) shall then be paid to the official assignee. But if the moneys to arise from such sale are insufficient to pay and satisfy what is so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend then already declared.

Proceeds of sale.

Special rules for inquiry into mortgage and for sale of mortgage debt.—P. 302, para. 466.

21. For the better taking of such inquiries and accounts, and making a title to the purchaser, all parties may be examined by the Court upon interrogatories or otherwise as the Court thinks fit, and shall produce before the Court upon oath all deeds, papers, books and writings in their respective custody or power relating to the estate or effects of the insolvent as the Court directs.

Proceedings on inquiry.

Periodical payments.

Sch. II

22. When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to day.

Periodical payments.

Parallel enactments.—B.A., 1883, Sch. II, r. 19; B.A., 1914, Sch. II, r. 20.

Interest.

23. (1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

Interest.

(a) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication; or,

(b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(2) Where a debt which has been proved in insolvency includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

Parallel enactments.—B.A., 1883, Sch. II, r. 20; B.A., 1914, Sch. II, r. 21; Prov. I. A., s. 48.

Proof for interest as a general rule allowed only up to adjudication.—P. 304, para. 462.

Where interest is not stipulated for.—P. 305, para. 463.

Where interest is stipulated for.—P. 305, para. 464.

Interest after date of order of adjudication.—P. 307, para. 466.

Interest on mortgage debt.—P. 307, para. 467.

Usurious Loans Act.—P. 307, para. 467A.

Debt payable at a future time.

24. A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate

Debt payable in future.

Sch. II of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Parallel enactments.—B.A., 1883, Sch. II, r. 21 ; B.A., 1914, Sch. II, r. 22, Prov. I. A., s. 45.

Debts payable at a future date.—P. 306, para. 465.

Interest after date of order of adjudication.—P. 307, para. 466.

Admission or rejection of proofs.

25. The official assignee shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part, or require further evidence in support of it. If he rejects a proof, he shall state in writing to the creditor the grounds of the rejection.

Admission or rejection of proof.

Parallel enactments.—B.A., 1883, Sch. II, r. 22 ; B.A., 1914, Sch. II, r. 23.

Admission and rejection of proofs.—P. 295, para. 446.

Withdrawing proof.—P. 296, para. 446.

26. If the official assignee thinks that a proof has been improperly admitted, the Court may, on the application of the official assignee, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

Court may expunge proof improperly received.

Parallel enactments.—B.A., 1883, Sch. II, r. 23 ; B.A., 1914, Sch. II, r. 24 ; Prov. I. A., s. 50.

Expunging and deducing proof.—P. 296, para. 448.

27. The Court may also expunge or reduce a proof upon the application of a creditor if the official assignee declines to interfere in the matter, or in the case of a composition or a scheme upon the application of the insolvent.

Power for Court to expunge or reduce proof.

Parallel enactments.—B.A., 1883, Sch. II, r. 25 ; B.A., 1914, Sch. II, r. 26 ; Prov. I. A., s. 50.

Expunging and deducing proof.—P. 296, para. 448.

Expunging debts from schedule.—P. 256, para. 381.

THE THIRD SCHEDULE.

Sch. III [Enactments repealed. Repealed by s. 3 and Sch. II of the Repealing and Amending Act, 1914 (10 of 1914)].

**CALCUTTA RULES MADE UNDER THE PRESIDENCY-TOWNS
INSOLVENCY ACT, III OF 1909.**

Preliminary.

Rules—P.-t. I. A.

Calcutta

1. These rules may be cited as "The Calcutta Insolvency Rules, 1910." They shall come into operation on the 1st January, 1910, and shall, so far as practicable, apply to all matters arising, and to all proceedings taken in any matters under the Act.

2. In these rules, unless the context or subject-matter otherwise requires—

(a) "The Act" means the Presidency-Towns Insolvency Act, 1909.

"The Court" includes the Registrar when exercising the powers of the Court pursuant to the Act, or these Rules.

"Creditor" includes a corporation or firm of creditors in partnership.

"Debtor" includes a firm of debtors in partnership, and includes any debtor proceeded against under the Act, whether adjudged insolvent or not.

"Judge" means the Judge of the High Court to whom the Insolvency business is for the time being assigned, under section 4 of the Act.

"Registrar" means the Registrar in Insolvency of the High Court.

"Scheme" means a scheme of arrangement pursuant to the Act.

"Sealed" means sealed with the seal of the Court.

"Taxing Officer" means and includes the officer of the Court, whose duty it is to tax costs in Insolvency proceedings.

"Writing" includes print and "written" includes printed.

(b) Words importing the plural number include the singular, and words importing the singular number include the plural, and words importing the masculine gender include feminine.

(c) The provisions of section 2 of the Act shall apply to these Rules, and any other terms or expressions defined by the Act, shall, in these Rules, have the meaning thereby assigned to them.

3. Where by the Act or these Rules the time limited for doing any act or thing is less than six days any day on which the offices of the Court are wholly closed shall be excluded in computing such time.

Forms.

4. The forms in the Appendix, where applicable, and where they are not applicable, forms of a like character with such variations as circumstances may require shall be used. Where such forms are applicable, any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct.

PART I.

COURT PROCEDURE.

Court and Chambers.

5. The following matters and applications shall be heard and determined in open Court, namely :—

(a) The public examination of debtors.

(b) Applications to approve a composition or scheme of arrangement.

(c) Applications for orders of discharge.

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- (d) Applications to set aside or avoid any settlement, conveyance, transfer, security or payment, or to declare for or against the title of the Official Assignee to any property adversely claimed.
- (e) Applications for the committal of any person to prison for contempt.
- (f) Appeals against the rejection of a proof or applications to expunge or reduce a proof where the amount in dispute exceeds Rs. 2,000.

Any other matter or application may be heard and determined in chambers.

6. The Registrar may, under the general or special directions of the Chief Justice, hear and determine any matter or application mentioned in sub-section (2) of section 6 of the Act.

7. Any matter or application pending before the Registrar which the Registrar has jurisdiction to determine, shall be adjourned to be heard before the Judge, if the Judge shall so direct.

8. Subject to the provisions of this Act and these Rules, any matter or application may at any time, if the Judge (or as the case may be the Registrar) thinks fit, be adjourned from Chambers to Court or from Court to Chambers; and if all the contending parties require any matter or application to be adjourned from Chambers into Court, it shall be so adjourned.

Proceedings.

9. (1) Every proceeding in Court under the Act shall be dated and shall be instituted "In Insolvency," with the name of the Court and of the matter to which it relates. Numbers and dates may be denoted by figures.

(2) All applications and orders shall be instituted *ex parte* the applicant.

(3) The first proceeding in every matter shall have a distinctive number assigned to it by the Registrar, and all subsequent proceedings in the same matter shall bear the same number.

(4) The Forms in the Appendix shall be used, with such variations or additions as circumstances may require.

10. All proceedings in Court shall be written or printed, or partly written and partly printed, on paper of the size hitherto used in insolvency.

11. All proceedings of the Court shall remain on record in the Court, so as to form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the Officers of the Court, or by special direction of the Judge or Registrar; but they may at all reasonable times be inspected by the Official Assignee, the debtor and any creditor who has proved, or any person on behalf of the Official Assignee, debtor or any such creditor.

12. All notices required by the Act or these Rules shall be in writing, unless these Rules otherwise provide, or the Court shall in any particular case otherwise order.

13. All summonses, petitions, notices, orders, warrants, and other process issued by the Court shall be sealed.

14. Where the Court orders a general meeting of creditors, it shall be summoned as the Court directs, and in default of any direction by the Court, the Registrar shall transmit a sealed copy of the order to the Official Assignee, and the Official Assignee shall not less than seven days before such meeting send a copy of the Order to each creditor at the address given in his proof, or when he shall not have proved, the address given in the schedule of creditors by the insolvent or such other address as may be known to the Official Assignee.

15. All office copies of petitions, proceedings, affidavits, books, papers and writings or any parts thereof required by the Official Assignee or by any debtor or by any creditor or by the attorney of the Official Assignee, or of any such debtor, or creditor shall be provided by the Registrar; and shall, except as to figures, be fairly written at length and be delivered out without any unnecessary delay, and in the order in which they shall have been bespoken.

16. The Registrar shall file a copy of each issue of the *Gazette of India* and of the *Calcutta Gazette*, and whenever the *Gazette* contains any advertisement relating to any matter under the Act, the Registrar shall file with the proceedings in the matter a memorandum referring to and giving the date of such advertisement. The memorandum of the Registrar shall be *prima facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* mentioned in it.

Motions and Practice.

17. Every application to the Court (unless otherwise provided by these Rules or the Court shall in any particular case otherwise direct) shall be made by motion supported by affidavit. The notice of motion shall be in Form No. 1A in the Appendix with such variations as the circumstances may require.

18. Where any party other than the applicant is affected by the motion, no order shall be made unless upon the consent of such party duly shown to the Court, or upon proof that notice of the intended motion and a copy of the affidavit in support thereof have been duly served upon such party; provided that the Court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail serious mischief, may make any order *ex parte* upon such terms as to costs and otherwise, and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside.

19. Unless the Court gives leave to the contrary, notice of motion shall be served on the party to be affected thereby not less than four clear days before the day named in the notice for hearing the motion. An application for leave to serve short notice of motion shall be made *ex parte*, and the fact that short notice has been allowed shall be stated in the notice of motion.

20. Where a respondent intends to use affidavits in opposition to a motion, he shall deliver copies of such affidavits to the applicant not less than two days before the day appointed for the hearing.

21. If on the hearing of any motion or application the Court shall be of opinion that any person to whom notice has not been given, ought to have, or ought to have had, such notice, the Court may either dismiss the motion or application or adjourn the hearing thereof, in order that such notice may be given, upon such terms as the Court shall think fit.

22. The hearing of any motion or application may, from time to time, be adjourned upon such terms (if any) as the Court shall think fit.

23. In cases in which personal service of any notice of motion, or of any order of the Court, is required the same shall be effected, in the case of a notice of motion, by delivering to each party to be served a copy of the notice of motion; and in the case of an order, by delivering to each party to be served a sealed copy of the order.

24. Every affidavit, to be used in supporting or opposing any opposed motion shall be filed with the Registrar not later than 4 o'clock on the day before the day appointed for the hearing.

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25. The Registrar, upon any affidavit being left with him to be filed, shall indorse the same with the day of the month and year when the same was so left, and forthwith file the same with the proceedings to which the same relates, and any affidavit left with the Registrar to be filed shall on no account be delivered out to any person except by order of the Court.

26. A party intending to move shall, not later than four o'clock on the day previous to the day appointed for the hearing, deliver to the Registrar a copy of his notice of motion. There shall be indorsed on such copy the name of the Applicant's Attorney (if any). Every notice of motion shall be entered by the Registrar in a list for hearing on the day appointed in such notice.

27. Except in cases of emergency, or for any other cause deemed sufficient by the Court, all motions shall be made and heard in the order in which they are set down on the list of motions prepared by the Registrar.

Preparation of Orders.

28. If within one week from the making of an order of adjudication, order annulling adjudication, order on application to approve a composition or scheme, order annulling a composition or scheme, or order on application for discharge, such order has not been completed, it shall be the duty of the Registrar to prepare and complete such order; provided that if in any case the Judge shall be of opinion that the provisions of this Rule ought not to apply, he may so order; and provided also that where an order of discharge is granted subject to the condition that judgment shall be entered against the insolvent, nothing in this Rule shall require the Registrar to prepare and complete the order until the Insolvent has given consent, in the prescribed form, to judgment being entered against him.

29. A person who has the carriage of an order shall obtain from the Registrar an appointment to settle the order, and shall give reasonable notice of the appointment to all persons who may be affected by the order, or to their attorneys.

Discovery of Debtor's Property.

30. Every application to the Court under section 36 of the Act shall be in writing, and shall state shortly the grounds upon which the application is made.

Appropriation of Pay, Salary, Income, &c.

31. When the Official Assignee intends to apply to the Court for an appropriation order under section 60 of the Act, he shall give to the insolvent notice of his intention so to do. Such notice shall specify the time and place fixed for hearing the application and shall state that the insolvent is at liberty to show cause against such order being made. The notice shall be in the Form No. 2, Appendix I, hereto, with such variations as circumstances may require.

32. Where an order is made under section 60 of the Act, the Registrar shall give to the Official Assignee a sealed copy of the order, who shall communicate the same to the chief of the department or other person under whom the pay, or salary, or income, or emolument is enjoyed or by whom the same is paid or disbursed.

33. Where an order has been made for the payment by an insolvent, or by his employer or the person by whom the same is paid or disbursed for the time being, of a portion of his pay, income, or salary, the insolvent may, upon his ceasing to receive a pay, salary, or income, of the amount he received when the order was made, apply to the Court to rescind the order or to reduce the amount ordered to be paid by him to the Official Assignee.

Warrants, Arrests, and Commitments.

34. A warrant of seizure, or a search warrant, or any other warrant issued under the provisions of the Act, shall be addressed to such officer of the High Court as the Court may in each case direct.

35. Where a debtor is arrested under a warrant issued under section 34 of the Act he shall be given into the custody of the Superintendent or Keeper of the prison mentioned in the warrant who shall produce such debtor before the Court as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order: and any books, papers, moneys, goods and chattels in the possession of the debtor which may be seized shall forthwith be lodged with the Official Assignee.

35A. When a person is apprehended under a warrant issued under section 36 (2) of the Act, the officer apprehending him shall forthwith bring him before the Court issuing the warrant to the end that he may be examined, and, if he cannot immediately be brought up for examination or examined, the officer shall, unless otherwise ordered by the Court, deliver him into the custody of the Superintendent or Keeper of the prison mentioned in the warrant, and the said Superintendent or Keeper shall receive him into custody and shall produce him before the Court, as it may from time to time direct or order, and, subject to such direction or order, shall safely keep him until such time as the Court may order.

35B. The officer executing a warrant issued under section 36 (2) of the Act shall forthwith, after apprehending the person named in the warrant and bringing him before the Court as in the last preceding rule mentioned or after delivering him to the Superintendent or Keeper of the prison in the last preceding rule mentioned, as the case may be, or the party as whose instance such warrant was issued, report such apprehension or delivery to the Court issuing the warrant, and apply to the Court to appoint a day and time for the examination of the person so apprehended, and the Court shall thereupon appoint the earliest practicable day for the examination, and shall issue its direction or order to the said Superintendent or Keeper to produce him for examination at a place and time to be mentioned in such direction or order, or may release him from custody, on his furnishing such security as the Court may order for his attendance for such examination. Notice of any such appointment shall forthwith be given to the Official Assignee by the party who shall have applied for the examination or warrant.

36. An application to the Court to commit any person for contempt of Court shall be supported by affidavit, and be filed in the Court in which the proceedings are.

37. Subject to the provisions of the Act and of the Rules, upon the filing of an application to commit, the Court shall fix a time and place for the Court to hear the application, notice whereof shall be personally served on the person sought to be committed, not less than four clear days before the day fixed for the hearing of the application: Provided that in any case in which the Court may think fit, the Court may allow substituted service of the notice by advertisement or otherwise, or shorten the length of notice to be given.

37A. Any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, shall unless otherwise ordered be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in this Court in its Original Jurisdiction. The Court may at any time of such examination or attendance fix the sum to which the witness is entitled and make an order for the payment thereof by the person upon whose application the witness has been summoned to attend. Such order may direct immediate payment of the sum fixed or any part thereof and may make such payment a condition of the commencement or continuance of the examination of the witness.

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38. Where an order of committal is made against a debtor for disobeying any order of the Court, or of the Official Assignee to do some particular act or thing, the Court may direct that the order of committal shall not be issued, provided that the debtor complies with the previous order within a specified time.

39. (1) If a debtor or witness examined before the Registrar refuses to answer to the satisfaction of the Registrar any question which he may allow to be put, the Registrar shall report such refusal in a summary way to the Judge, and upon such report being made the debtor or witness in default shall be in the same position and be dealt with in the same manner as if he had made default in answering before the Judge.

(2) The report of the Registrar shall be in writing, but without affidavit, and shall set forth the question put and the answer (if any) given by the debtor or witness.

(3) The Registrar shall, before the conclusion of the examination at which the default in answering is made, name the time when and the place where the default will be reported to the Judge; and upon receiving the report, the Judge may take such action thereon as he shall think fit. If the Judge is sitting at the time when the default in answering is made, such default may be reported immediately.

(4) The report of the Registrar may be in the Form No. 3, in Appendix.

Service and Execution of Process.

40. Every attorney suing out or serving any petition, notice, summons, order, or other document, shall indorse thereon his name or firm and place of business in Calcutta, which shall be called his address for service. All notices, orders, documents, and other written communications which do not require personal service shall be deemed to be sufficiently served on such attorney if left for him at his address for service.

41. Service of notices, orders, or other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon of any week day, except Saturday, shall for the purpose of computing any period of time subsequent to such service be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday, shall, for the like purpose, be deemed to have been effected on the following Monday.

42. It shall be the duty of such officer as the Court may direct, to serve such orders, summonses, petitions, and notices as the Court may require him to serve; to execute warrants and other process, to attend any sittings of the Court (but not sittings in Chambers); and to do and perform all such things as may be required of him by the Court.

But this Rule shall not be construed to require any order, summons, petitions, or notice to be served by an officer of the Court which is not specially by the Act or these Rules required to be so served, unless the Court shall in any particular proceeding by order specially so direct.

43. Where notice of an order or other proceeding in Court may be served by Post it shall be sent by registered letter.

44. Every order of the Court may be enforced as if it were a decree of the Court to the same effect.

Rules relating to the Business of the Court.

45. The Chief Justice shall regulate the insolvency sittings of the Court.

46. The office of the registrar shall be kept open daily, throughout the year, during such days and during such hours as the offices on the Original Side of the Court are kept open.

Costs.

47. (1) The Court in awarding costs may direct that the costs of any matter or application shall be taxed and paid as between party and party or as between attorney and client, or that full costs, charges and expenses shall be allowed, or the Court may fix a sum to be paid in lieu of taxed costs.

(2) In the absence of any express direction, costs of an opposed motion shall follow the event, and shall be taxed as between party and party.

(3) Where an action is brought against the Official Assignee as representing the estate of the debtor, or where the Official Assignee is made a party to a cause or matter, on the application of any other party thereto, he shall not be personally liable for costs unless the Court otherwise directs.

48. Every order for payment of money and costs, or either of them, shall be sealed and be signed by the Registrar, and shall be forthwith filed with the proceedings.

49. The costs directed by any order to be paid shall be taxed on production of an office copy of such order, and the allocatur being duly stamped shall be signed and dated by the Taxing Officer.

Taxing Officer.

50. (1) All bills of costs shall be taxed by the Taxing Officer of the High Court on its Original Side, and the Calcutta High Court Rules relating to the taxation of costs shall apply to the taxation of such bills as far as circumstances will permit.

(2) The table of fees made and established in the High Court, Original Side, and the Table of Fees made and established under the Indian Insolvency Act, 1848, shall so far as circumstances will permit be applicable to and charged for and in respect of proceedings under the Presidency-towns Insolvency Act, 1909.

51. The attorney in the matter of an insolvency petition presented by the debtor against himself shall, in his bill of costs, give credit for such sum or security (if any) as he may have received from the debtor, as a deposit on account of the costs and expenses to be incurred in and about the filing and prosecution of such petition; and the amount of any such deposit shall be noted by the Taxing Officer upon the allocatur issued for such costs.

52. When a bill of costs is taxed under any special order of the Court, and it appears by such order that the costs are to be paid otherwise than out of the estate of the insolvent, the Taxing Officer shall specially note upon the allocatur by whom, or the manner in which such costs are to be paid.

53. Upon the taxation of any bill of costs, charges, or expenses, being completed, the Taxing Officer shall forthwith file such bill with the proceedings in the matter, and shall thereupon issue to the person presenting such bill for taxation his allocatur, or certificate of taxation, which shall be in the Form No. 4 in the Appendix.

54. The Taxing Officer shall keep a register of all bills taxed by him, according to Form No. 5 in the Appendix, and shall, within fourteen days of the 31st day of December in each year, make a return to the Chief Justice, according to Form No. 6 in the Appendix, of all bills taxed by him during the twelve months preceding such 31st day of December.

55. Before taxing the bill or charges of any attorney, manager, accountant, auctioneer, broker or other person employed by the Official Assignee, the Taxing Officer shall require a certificate in writing, signed by the Official Assignee, to be produced to him, setting forth whether any, and if so what, special terms of remuneration have been agreed to.

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56. Every person whose bill or charges is or are to be taxed shall in all cases give not less than seven days' notice of the appointment to tax the same to the Official Assignee.

57. The bill or charges shall be lodged with the Official Assignee, three clear days before the application for the appointment to tax the same is made. The Official Assignee shall forthwith, on receiving notice of taxation, lodge such bill or charges with the Taxing Officer.

58. Every person whose bill or charges is or are to be taxed, shall, on application of the Official Assignee, furnish a copy of his bill or charges so to be taxed, on payment at the rate of five annas per folio, which payment may be charged to the estate.

59. Where any party to, or person affected by, any proceeding desires to make an application for an order that he be allowed his costs, or any part of them, incident to such proceeding, and such application is not made at the time of the proceeding—

(1) Such party or person shall serve notice of his intended application on the Official Assignee :

(2) The Official Assignee may appear on such application and object thereto :

(3) No costs of or incidental to such application shall be allowed to the applicant, unless the Court is satisfied that the application could not have been made at the time of the proceeding.

60. The assets in every matter remaining after payment of the actual expenses incurred in realizing any of the assets of the debtor, shall, subject to any order of the Court, be liable to the following payments which shall be made in the following order of priority, namely:—

First.—The actual expenses incurred by the Official Assignee in protecting the property or assets of the debtor, or any part thereof and any expenses incurred by him or by his authority in carrying on the business of the debtor ;

Next.—Any fees payable to or costs, charges or expenses incurred or authorised by the Official Assignee.

Next.—The balance of any deposits lodged with the Official Assignee under these Rules.

Next.—The remuneration of the special manager (if any).

Next.—The remuneration (if any) of the Official Assignee.

Next.—Any allowance made to the insolvent pursuant to an order of the Court.

Next.—Any costs directed by the Court to be paid out of the estate.

61. In any case in which, after an insolvency petition has been presented by a creditor against the debtor, and before the hearing of such petition, the debtor files a petition, and an adjudication order is made on the petition of the debtor, unless in the opinion of the Court the estate has benefited thereby, or there are special circumstances which make it just that such costs should be allowed, no costs shall be allowed to the debtor or his attorney out of the estate.

62. In the case of an insolvency petition against a partnership, the costs payable out of the estates incurred up to and inclusive of the adjudication order shall be apportioned between the joint and separate estates in such proportions as the Official Assignee may in his discretion determine.

63. (1) Where the joint estate of any co-debtor is insufficient to defray any costs or charges properly incurred, the Official Assignee may pay such costs or charges out of the separate estates of such co-debtors, or one or more of them, in such proportions as

in his discretion the Official Assignee may think fit. The Official Assignee may also, as in his discretion he may think fit, pay any costs or charges properly incurred, for any separate estate out of the joint estate or out of any other separate estate, and any part of the costs or charges of the joint estate which affects any separate estate out of that separate estate.

(2) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred, the Official Assignee may pay such costs or charges out of the separate estates of such co-debtors or one or more of them. The Official Assignee may also pay any costs or charges properly incurred for any separate estate, out of the joint estate, and any part of the costs or charges of the joint estate incurred which affects any separate estate, out of that separate estate. No payment under this Rule shall be made out of a separate estate or joint estate by the Official Assignee without an order of the Court.

Annulment of Adjudication.

64. An application to the Court to annul an adjudication shall not be heard except upon proof that notice of the intended application, and a copy of the affidavits in support thereof have been duly served upon the Official Assignee. Unless the Court gives leave to the contrary, notice of any such application shall be served on the Official Assignee not less than seven days before the day named in the notice for hearing the application. Pending the hearing of the application, the Court may make an interim order staying such of the proceedings as it thinks fit.

64A. The Registrar shall send notice of an order annulling an adjudication to such local paper (if any) as the Court may in each case direct.

Protection Order.

65. Every debtor, intending to apply for a protection order, shall give four days previous notice to the Official Assignee and also to each execution creditor unless the Court shall think fit to dispense with notice to any of such creditors. Every application for protection shall be made by petition verified by affidavit setting forth the grounds on which the application is made.

65A. There shall be a note at the foot of every order for protection of an insolvent in the following terms:—

“NOTE.—Notice is hereby given to the insolvent/insolvents abovenamed that if he/they fail without reasonable excuse to attend before this Court and/or before the Official Assignee of Calcutta whenever required to do so until he obtains his discharge, this order will be liable to be rescinded.”

Registrar.

PART II.

PROCEEDINGS.

Insolvency Petition.

66. Every petition shall be fairly written or printed or partly written and partly printed and no alterations, interlineations or erasures shall be made without the leave of the Registrar, except so far as may be necessary to adapt a printed form to the circumstances of the particular case. A debtor's petition shall be in Form No. 7 and a creditor's petition shall be in Form No. 8 in the Appendix, with such variations as circumstances may require.

67. (1) Where a petition is presented by a debtor he shall, besides inserting therein his name and description, and his address at the date when the petition is presented,

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Calcutta further describe himself as lately residing or carrying on business at the address or several addresses as the case may be, at which he has incurred debts and liabilities which at the date of the petition remain unpaid or unsatisfied. The petition shall also state whether any previous petition has been presented to the Court either by or against the debtor, with particulars of any such petition and the manner in which it was disposed of.

(2) Where a petition is presented against a debtor who resides or carries on business at an address other than the address at which the debtor was residing or carrying on business at the time of contracting the debt or liability in respect of which the petition is presented, the petitioning creditor, in addition to stating in the petition the description of the debtor, as of his then present address and description, shall, in the petition, describe the debtor as lately residing or carrying on business at the address at which he was residing or carrying on business when the debt or liability was incurred.

68. Every insolvency petition shall be attested. If it be attested in British India, the witness must be an Attorney, or Magistrate or the Official Assignee or the Registrar or a Commissioner for oaths and affirmations. If it be attested out of British India, the witness must be a Judge or Magistrate or a British Consul or Vice-Consul or a Notary Public.

69. (1) Upon the presentation of a petition by a debtor, the petitioner shall deposit with the Official Assignee the sum of Rs. 50, and such further sum (if any) as the Court may from time to time direct, to cover the fees and expenses to be incurred by the Official Assignee; and no petition shall be received unless the receipt of the Official Assignee for the deposit payable on the presentation of the petition, is produced to the proper officer of the Court.

(2) Upon the presentation of a petition by a creditor, the petitioner shall deposit with the Official Assignee the sum of Rs. 75, and such further sum (if any) as the Court may from time to time direct to cover the fees and expenses to be incurred by the Official Assignee; and no petition shall be received unless the receipt of the Official Assignee for the deposit, payable on the presentation of the petition, is produced to the proper officer of the Court.

(3) The Official Assignee shall cause the order for adjudication made on the application of such creditor to be drawn up, signed and filed and shall out of the said sum of Rs. 75, pay the costs thereof and of obtaining a certified copy thereof for service on the insolvent.

(4) The Official Assignee shall account for the money so deposited, to the creditor, or, as the case may be, to the debtor's estate, and any sum so paid by a petitioning creditor shall be repaid to such creditor (except and so far as such deposit may be required by reason of insufficiency of assets for the payment of the fees of and expenses incurred by the Official Assignee) out of the proceeds of the estate in the priority prescribed by these rules.

Creditor's Petition.

70. A petitioning creditor who is a resident abroad, or whose estate is vested in a trustee under any law relating to insolvency, or against whom a petition is pending under the Act, or who has made default of payment of any costs ordered by any Court to be paid by him to the debtor, may be ordered to give security for costs to the debtor.

71. Every creditor's petition shall be verified by affidavit.

72. When the petitioning creditor cannot himself verify all the statements contained in the petition, he shall file in support of the petition the affidavit of some person who can depose to them.

73. Where a petition is presented by two or more creditors jointly, it shall not be necessary that each creditor shall depose to the truth of all the statements, which are within his own knowledge; but it shall be sufficient that each statement in the petition is deposed to by some one within whose knowledge it is.

73A. Every petition by a creditor for adjudication of a debtor shall be presented to the Registrar for admission.

73B. The Registrar shall upon a petition by a creditor being presented examine the same and if the petition is in order and all fees have been paid and sums deposited as prescribed he shall endorse the petition accordingly and after such endorsement he shall admit the petition and cause the application to be entered for disposal in the Judges list of causes for the next day appointed for the hearing of applications of the like nature or he may at the option of the applicant refer him to the Judge.

73C. If on such examination it shall appear to the Registrar that the petition is notion order or that any fee or sum has not been paid or deposited as prescribed or that in any respect the provisions of the Act or of these Rules have not been complied with or that for any other sufficient reason the petition should not be admitted, he shall endorse the petition accordingly specifying the defect or irregularity by reason whereof the same should not be admitted and after such endorsement he shall return the petition to the applicant or at the option of the applicant refer him to the Judge.

Hearing of Petition.

74. (1) Where a petition is filed by a debtor, the Court shall forthwith make an adjudication order thereon.

(2) Where a petition is filed by a creditor, the Court shall, upon proof of such statements in the petition as the Court shall think sufficient, forthwith make an adjudication thereon, unless the Court is of opinion that the petition ought to be served on the debtor, in which case the Court shall adjourn the hearing of the petition to some date and time to be fixed by the Court.

75. Where the Court directs that a creditor's petition shall be served upon a debtor, such service shall be effected by an officer of the Court or by the creditor or his attorney, or by some person in their employ, by delivering to the debtor a copy of the filed petition; provided that if personal service cannot be effected, the Court may extend the time for hearing the petition, or if the Court is satisfied by affidavit or other evidence that the debtor is keeping out of the way to avoid such service, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business, or by registered letter or in such other manner as the Court may direct, and that such petition shall then be deemed to have been duly served on the debtor.

76. Where the Court orders service of the petition on the debtor, such service shall be proved by affidavit, with a copy of the petition attached, which shall be filed in Court forthwith after the service.

77. Where the Court orders service of a petition on a debtor petitioned against who is not within the limits of the Original Civil Jurisdiction of the Court, the Court may order service to be made within such time and in such manner and form as it shall think fit.

78. If a debtor upon whom the Court has ordered service of an insolvency petition dies before service thereof, the Court may order service to be effected on the legal representatives of the debtor, or on such other persons as the Court may think fit.

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79. Where a debtor, having been served with a petition, intends to show cause against the same, he shall file a notice with the Registrar, specifying the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor and his attorney, if known, a copy of the notice three days before the day on which the petition is to be heard.

80. If the debtor does not appear at the adjourned hearing, the Court may make an adjudication order on such proof of the statements in the petition as the Court shall think sufficient.

81. On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of insolvency, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved, and if any new evidence of those matters, or any of them, shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to show cause, the Court shall, if the application appears to the Court to be reasonable, grant such further time as the Court may think fit.

82. If any creditor neglects to appear on the hearing or adjourned hearing of his petition, no subsequent petition against the same debtor or debtors, or any of them, either alone or jointly with any other person, shall be presented by the same creditor in respect of the same act of insolvency without the leave of the Court.

83. The personal attendance of the petitioning creditor and of the witnesses to prove the debt and act of insolvency or other material statements, upon the adjourned hearing of the petition, may, if the Court shall think fit, be dispensed with.

84. Where proceedings on a petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt and such question has been decided in favour of the validity of the debt, the petitioning creditor may apply to the Registrar to fix a day on which further proceedings on the petition may be heard, and the Registrar, on production of the judgment of the Court in which the question was tried, or an office copy thereof, shall give notice to the petitioner by post of the time and place fixed for the hearing of the petition, and a like notice to the debtor at the address given in his notice to dispute and also to their respective attorneys, if known.

85. Where proceedings on a petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and such question has been decided against the validity of the debt, the debtor may apply to the Registrar to fix a day on which he may apply to the Court for the dismissal of the petition with costs, and the Registrar, on the production of the judgment of the Court in which the question was tried, or an office copy thereof, shall give notice to both the petitioner and debtor (and to their respective attorneys, if known) by post of the time and place fixed for the hearing of the application.

86. An application for extension of time for the adjourned hearing of a petition shall be in writing, but need not be supported by affidavit unless in any case the Court shall otherwise require.

87. On an application for extension of time for the adjourned hearing of a petition, no order shall be made for an extension beyond fourteen days from the day fixed for the adjourned hearing of the petition, unless the Court is satisfied that such extension of time will not be prejudicial to the general body of creditors. Any costs occasioned by such application shall not be allowed out of the estate unless so ordered by the Court.

Interim Receiver.

88. After the presentation of a petition, upon the application of a creditor, or of the debtor himself, and upon proof by affidavit of sufficient ground for the appointment of the Official Assignee as *interim* receiver of the property of the debtor, or any part thereof, the Court may, if it thinks fit, and upon such terms as may be just, make such appointment.

89. Where an order is made appointing the Official Assignee to be *interim* receiver of the property of the debtor, such order shall bear the number of the petition in respect of which it is made and shall state the locality of the property of which the Official Assignee is ordered to take possession.

90. Before any such order is issued, the person who has made the application therefor shall deposit with the Official Assignee, the sum of Rs. 100 towards the prescribed fee for the Official Assignee, and such further sum as the Court shall direct for the expenses which may be incurred by him.

91. If the sum of Rs. 100 and such further sum so to be deposited for the expenses which may be incurred by the Official Assignee, shall prove to be insufficient, the person, on whose application the order has been made, shall from time to time deposit with the Official Assignee such additional sum as the Court may, on the application of the Official Assignee, from time to time direct; and such sum shall be deposited within twenty-four hours after the making of the order therefor. If such additional sum shall not be so deposited, the order appointing the *interim* receiver may be discharged by the Court.

92. If an order appointing an *interim* receiver is followed by an adjudication order, the deposits made by the creditor on whose application such *interim* receiver was appointed, shall be repaid to him (except and so far as such deposits may be required by reason of insufficiency of assets for the payment of the fees chargeable, and the expenses incurred by the *interim* receiver), out of the proceeds of the estate in the order of priority prescribed by these Rules.

93. Where, after an order has been made appointing an *interim* receiver, the petition is dismissed, the Court shall, upon application to be made within 21 days from the date of the dismissal thereof, adjudicate with respect to any damages or claim thereto arising out of the appointment and shall make such order as the Court thinks fit; and such decision or order shall be final and conclusive between the parties, unless the order be appealed from.

Adjudication.

94. (1) An order of adjudication shall be in one of the Forms Nos. 9 and 10 in the Appendix, with such variations as circumstances may require.

(2) Where any adjudication order is made on a creditor's petition, there shall be stated in the adjudication order the nature and date, or dates of the act, or acts of insolvency upon which the order has been made. Every order shall contain at the foot thereof a notice requiring the debtor to attend on the Official Assignee forthwith on the service thereof at the place mentioned therein.

95. Every adjudication order, and order for the appointment of the Official Assignee as *interim* receiver of a debtor's property, shall be prepared by the Registrar, and, in cases in which printed forms can be conveniently used, may be partly in print and partly in writing. Where the petitioner is represented by an attorney the adjudication order shall be indorsed with the name and address of such attorney.

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96. A copy of every adjudication order, and order for the appointment of the Official Assignee as *interim* receiver of the debtor's property, sealed with the seal of the Court, shall forthwith be sent by the Registrar to the Official Assignee.

97. The Official Assignee shall cause a copy of the adjudication order sealed with the seal of the Court, to be served on the debtor.

98. There may be included in an adjudication order an order staying any suit or proceeding against the debtor or staying proceedings generally.

99. Where an adjudication order is made, the Official Assignee shall forthwith gazette the same and send notice thereof to such local paper, as he may select. The notice shall be in the Form No. 11 in the Appendix, with such variations as circumstances may require.

100. All proceedings under the Act down to and including the making of an adjudication order, shall be at the cost of the party prosecuting the same, but when an adjudication order is made, the costs of the petitioning creditor shall be taxed and be payable out of the proceeds of the estate, in the order of priority prescribed by these Rules.

101. (1) An order annulling an adjudication may be in the Form No. 12 in the Appendix, with such variations as circumstances may require.

(2) When an adjudication is annulled the Registrar shall forthwith give notice thereof to the Official Assignee in order that the annulment may be gazetted.

(3) The order of the Court, annulling an adjudication, shall not relieve the Official Assignee from the liability, imposed on him by the Act and these Rules, to account for all transactions of such Official Assignee in connection with the estate.

102. Where a debtor against whom an order of adjudication has been made is not in British India, the Court may order service on the debtor of the order of adjudication, order to attend the public examination, or any adjournment thereof or of any other order made against, or summons issued for the attendance of, the debtor, to be made within such time and in such manner and form as it shall think fit.

Schedule of Affairs.

103. Every insolvent shall be furnished by the Official Assignee with instructions for the preparation of his schedule of affairs. The schedule of affairs (which shall be made out in duplicate and one copy of which shall be verified by affidavit) shall be in the Form No. 13 in Appendix, with such variations or additions as circumstances may require. The insolvent shall file with the Registrar the verified Schedule, and the duplicate Schedule with the Official Assignee.

103A. The Court may on the application of the insolvent allow him at any time before his discharge to amend his schedule of affairs. Such amendments shall be verified by the insolvent.

Public Examination of Debtor.

104. When an adjudication order has been made against a debtor, it shall be the duty of the Official Assignee to make an application to the Court to appoint a day and hour for holding the public examination of the debtor and upon such application being made, the Court shall by an order appoint the day and hour for such public examination and shall order the debtor to attend the Court upon such day and at such hour.

105. Where any order is made appointing the time and place for holding the public examination of a debtor, the Official Assignee shall serve a copy thereof on the debtor, and shall give to the creditors notice of such order, and of the time and place appointed thereby. The Official Assignee shall also send a notice of such order to such local paper as the Court may from time to time direct, or in default of such direction, as he may think fit.

106. Where the Court is of opinion that a debtor is failing to disclose his affairs, or where the debtor has failed to attend the public examination, or any adjournment thereof, or where the debtor has not complied with any order of the Court in relation to his accounts, conduct, dealings, and property and no good cause is shown by him for such failure, the Court may adjourn the public examination *sine die* and may make such further or other order as the Court shall think fit.

107. Where an examination has been adjourned *sine die*, and the debtor desires to have a day appointed for proceeding with his public examination, the expenses gazetted, advertising and of giving notice to creditors of the day to be appointed for proceeding with such examination, shall, unless the Official Assignee consents to the costs being paid out of the estate, be at the cost of the debtor who shall, before any day is appointed for proceeding with the public examination, deposit with the Official Assignee such sum as the Official Assignee shall think sufficient to defray the expenses aforesaid. The balance of the deposit after defraying the expenses aforesaid shall be returned to the debtor.

108. In any case in which a public examination has been adjourned *sine die* and the Court afterwards makes an order for proceeding with such examination, notice to creditors of the time and place appointed for proceeding with such examination shall be sent by the Official Assignee and notice shall also be inserted in the Calcutta Gazette and in the local paper, in which the notice of the first holding of the public examination was inserted, seven days before the day appointed.

109. (1) An application for an order dispensing with the public examination of a debtor, or directing that the debtor be examined in some manner or at some place other than is usual, on the ground that the debtor is a lunatic or suffers from mental or physical affliction, or disability rendering him unfit to attend a public examination, may be made by the Official Assignee or by any person who has been appointed by any Court having jurisdiction so to do to manage the affairs of or represent the debtor or by any relative or friend of the debtor who may appear to the Court to be a proper person to make the application.

(2) Where the application is made by the Official Assignee, it may be made *ex parte* and the evidence in support of the application may be given by a report of the Official Assignee to the Court, the contents of which report shall be received as *prima facie* evidence of the matters stated therein.

(3) Where the application is made by some person other than the Official Assignee, it shall be made by motion of which notice shall be given to the Official Assignee, and shall, except in the case of a lunatic so found by inquisition, be supported by an affidavit of a duly qualified medical practitioner as to the physical and mental condition of the debtor.

(4) The order to be made on the application shall be in the Form No. 14 or the Form No. 15 in the Appendix, as the case may be, with such variations as circumstances may require.

Rules—P.-t. I. A.**Calcutta***Composition or Scheme.*

110. Where a debtor intends to submit a proposal for a composition or a scheme, the *Forms of Proposal, Notice, and Report*, Nos. 16, 17, 18, and 19 in the Appendix, with such variations as circumstances may require, shall be used by the Official Assignee for the purpose of the meeting of creditors for consideration of the proposal.

111. Where the creditors have accepted a composition or scheme and the public examination of the debtor has been concluded, the Official Assignee or the debtor may forthwith apply to the Court to fix a day for the hearing of an application for the approval of such composition or scheme. The Official Assignee shall not by making such application be deemed necessarily to approve of the composition or scheme.

112. Any person other than the Official Assignee who applies to the Court to approve of a composition or scheme shall, not less than ten days before the day appointed for hearing the application, send notice of the application to the Official Assignee.

113. Whenever an application is made to the Court to approve of a composition or scheme, the Official Assignee shall, not less than three days before the day appointed for hearing the application, send notice of the application to every creditor who has proved his debt.

114. In every case of an application to the Court to approve of a composition or scheme, the Report of the Official Assignee shall be filed not less than four days before the day fixed for the hearing of the application.

115. On the hearing of any application to the Court to approve of a composition or scheme, the Court shall, in addition to considering the report of the Official Assignee, hear the Official Assignee thereon.

116. No costs incurred by a debtor of or incidental to an application to approve of a composition or scheme, shall be allowed out of the estate if the Court refuses to approve the composition or scheme.

117. The Court before approving of a composition or scheme shall, in addition to investigating the other matters as required by the Act, require proof that the provisions of Section 28, Sub-Sections (1) and (2) of the Act have been complied with. An order approving of a composition or scheme shall be in the Form No. 20 in the Appendix with such variations as circumstances may require.

118. Where a composition or scheme has been duly accepted by the creditors, such composition or scheme shall not be approved by the Court unless the Court is satisfied on the report of the Official Assignee that provision is made for payment of all proper costs, charges and expenses of and incidental to the proceedings and all proper fees, and percentages payable under the scale of fees, and percentages in force for the time being.

119. The fee prescribed to be charged for and in respect of an application to the Court to approve of a composition or scheme may be allowed and paid out of the estate of the debtor in any case in which there are sufficient funds in the hands of the Official Assignee available for the purpose.

120. At the time the composition or scheme is approved of, the Court may correct or supply any accidental or formal slip, error or omission therein, but no alteration in the substance of the composition or scheme shall be made.

121. When a composition or scheme is approved of, the Official Assignee shall, on payment of all proper costs, charges and expenses of and incidental to the proceedings and all proper fees, and percentages payable under the scale of fees and percentages

in force for the time being, forthwith put the debtor (or as the case may be the trustee under the composition or scheme or the other person or persons to whom under the composition or scheme the property of the debtor is to be assigned) into possession of the debtor's property. The Court shall also annul the order of adjudication.

122. In every case of a composition or scheme in which a trustee is not appointed, or, if appointed, declines to act, or become incapable of acting, or is removed, the Official Assignee shall, unless and until another trustee is appointed by the creditors, be the trustee for the purpose of receiving and distributing the composition, or for the purpose of administering the debtor's property, and carrying out the terms of the composition or scheme, as the case may be.

123. Where under a composition or scheme of arrangement a trustee is appointed, he shall after the composition or scheme has been approved by the Court, give security to the satisfaction of the Registrar. If the trustee fail to give such security within the time required, he may be removed by the Registrar.

124. Where a composition or scheme has been approved and default is made in any payment thereunder either by the debtor or the trustee (if any), no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the Court.

125. Where a composition or scheme is annulled, the property of the debtor shall unless the Court otherwise directs, forthwith vest in the Official Assignee without any special order being made or necessary.

126. Where a composition or scheme is annulled, the trustee under the composition or scheme, shall account to the Official Assignee for any money or property of the debtor which has come to his hands, and pay or deliver over to the Official Assignee any money or property which has not been duly administered.

126A. Unless otherwise directed by the Court, the account mentioned in the preceding rule, shall be verified by the affidavit (Form No. 21A in the appendix) of the trustee. Such account shall be in the form of a debtor and creditor account (Form No. 21B in the appendix) and shall truly set forth all sums received by the trustee (Form No. 16 in the appendix). The items of each side of the account shall be numbered consecutively, the items on the credit side shewing when, to whom and for what purpose such sums were paid, and the account shall be annexed to the affidavit as an exhibit and the vouchers bearing the corresponding numbers shall be made over to the Official Assignee along with the account. The Official Assignee shall examine the account and in writing certify as to whether he is satisfied regarding the correctness thereof.

126B. Save by the special order of the Judge, to be obtained upon motion after notice to the Official Assignee, no bond or security deposit executed or made by the trustee under rule 123 shall be cancelled or returned to him, as the case may be, unless and until he produces a certificate from the Official Assignee of the nature mentioned in the preceding rule to the effect that the trustee has properly accounted for all moneys that came to his hands.

127. Where under any composition or scheme provision is made for the payment of any moneys to creditors entitled thereto and any claim, in respect of which a proof has been lodged, is disputed, the Court may, if it shall think fit, direct that the amount which would be payable on such claim if established shall be secured in such manner as the Court shall direct, until the determination of the claim so disputed; and on the determination thereof, the sum so secured shall be paid as the Court may direct.

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128. Every person claiming to be a creditor under any composition or scheme, who has not proved his debt before the approval of such composition or scheme, shall lodge his proof with the trustee thereunder, if any, or if there is no such trustee, with the Official Assignee who shall admit or reject the same. And no creditor shall be entitled to enforce payment of any part of the sums payable under a composition of scheme unless and until he has proved his debt and his proof has been admitted.

128A. Except where these rules otherwise provide, where a person is required to give security, such security shall be in the form of a bond with one or more surety or sureties in favour of the Registrar.

128B. The bond shall be taken in a penal sum, which shall be not less than the sum for which security is to be given.

128C. Where a person has to give security, he or his sureties may be required to lodge in Court a sum or security for money equal to the sum in respect of which security is to be given or title-deeds of any property belonging to such person or his surety or sureties, together with a bond to be approved of by the Registrar and to be executed by such person and his surety or sureties setting forth the conditions on which the deposit is made.

128D. The rules for the time being in force in this Court in its Ordinary Original Civil Jurisdiction relating to sureties and regarding payment into and out of Court money and securities for money lodged in Court by way of security for costs or otherwise shall apply to money and securities for money lodged in Court under these rules.

128E. A Guarantee Association or Society duly approved of by the Full Court may be accepted as surety upon its joining in a bond with the person required to give security.

128F. In all cases where a person proposes to give a bond by way of security he shall serve the other parties interested or concerned and the Registrar, with notice of the proposed sureties and the Registrar shall forthwith give notice to both parties of the time and place at which he proposes that the sufficiency of the proposed security shall be investigated by him, and that should the other party have any valid objection to make to the proposed sureties or either of them, it must be made at that time.

128G. Every person other than a Guarantee Society, offering himself as a surety, shall, where so required, produce before the Registrar his title-deeds and vouchers, and make an affidavit of justification or be examined by the Registrar on oath or solemn affirmation, as the case may be, touching the value of his property and the debts and liabilities to which it is subject, after being examined and allowed, the surety shall sign the bond, and where the Registrar so requires, deposit his title-deeds and vouchers with the Registrar of this Court in its Original Jurisdiction.

128H. The bond shall be executed and attested in the presence of the Registrar, or before a Solicitor, and the parties executing the same shall be identified by a Solicitor, unless the Registrar otherwise directs.

128I. Where a person makes a deposit of money in lieu of giving a bond, the Registrar shall make same over to the Registrar of this Court in its Original Jurisdiction.

128J. Proof of Debts.—Subject to the power of the Court to extend the time, the Official Assignee within twenty-eight days after receiving a proof which has not previously been dealt with by him shall, in writing, either admit or reject it wholly or in part, or require further evidence in support thereof: Provided that where the Official Assignee has given notice of his intention to declare a dividend he shall, within fourteen days after the date mentioned in such notice as the latest date upto which proof must be lodged,

examine and in writing admit, or reject every proof which has not been already admitted or rejected, and give notice of his decision rejecting a proof wholly or in part to the creditor affected thereby.

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Dividends.

129. (1) Not more than two months before declaring a dividend, the Official Assignee shall give notice in the Gazette of his intention so to do and at the same time, to such of the creditor mentioned in the insolvent's schedule of affairs as have not proved their debts. Such notice shall specify the latest date up to which proofs must be lodged which shall not be less than fourteen days from the date of such notice.

(2) Where any creditor, after the date mentioned in the notice of intention to declare a dividend as the latest date upon which proofs may be lodged, appeals against the decision of the Official Assignee rejecting a proof, the Official Assignee shall, in such case, make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted. Where no appeal has been commenced within the time specified in the Act, the Official Assignee shall exclude all proofs which have been rejected from participation in the dividend.

(3) Immediately after the expiration of the time fixed by the Act for appealing against the decision of the Official Assignee, he shall proceed to declare a dividend and shall give notice thereof by advertisement in the Gazette and shall also send a notice of dividend to each creditor whose proof has been admitted, accompanied by a statement shewing the position of the estate.

(4) The notices shall be in the Forms Nos. 21 and 22 in the Appendix with such variations as circumstances may require.

(5) If it becomes necessary, in the opinion of the Official Assignee and the Committee of Inspection (if any) to postpone the declaration of the dividend beyond the prescribed limit of two months, the Official Assignee shall give a fresh notice of his intention to declare a dividend by advertisement in the Gazette, but it shall not be necessary for the Official Assignee to give fresh notice to such of the creditors mentioned in the Insolvent's Schedule of affairs as have not proved their debts. In all other respects the same procedure shall follow the fresh notice as would have followed the original notice.

(6) The Official Assignee shall pay interest at the rate of 6 per cent. on any dividend ordered to be paid by him under the provision of Section 74 of the Act.

130. Subject to the power of the Court in any other case on special grounds to order production to be dispensed with, every bill of exchange, hoondi, promissory note or other negotiable instrument of security upon which proof has been made, shall be exhibited to the Official Assignee before payment of dividend thereon, and the amount of dividend paid shall be indorsed on the instrument.

131. The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post.

131A. In all cases in which an insolvent is publicly examined under Section 27 of the Act and there are assets belonging to the estate of the insolvent, the Official Assignee shall, in due course of administration and subject to rule 60, pay the fees for swearing and reducing into writing the deposition of the insolvent and for filing the exhibits put in.

Discharge.

132. (1) An insolvent intending to apply for his discharge under Section 38 of the Act shall produce to the Registrar a certificate from the Official Assignee specifying the

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(2) Notice of the day appointed for the hearing of the debtor's application for discharge shall be sent by the Official Assignee to each creditor not less than one month before the day so appointed. Such notice shall be in the Form No. 23 in the Appendix.

133. In every case of an application by an insolvent for his discharge the report of the Official Assignee shall be filed not less than seven days before the time fixed for the hearing of the application.

134. Where an insolvent intends to dispute any statement with regard to his conduct and affairs contained in the Official Assignee's report, he shall, not less than two days before the hearing of the application for discharge, give notice in writing to the Official Assignee specifying the statements in the report, if any, which he proposes at the hearing to dispute. Any creditor who intends to oppose the discharge of an insolvent on grounds other than those mentioned in the Official Assignee's report, shall give notice of the intended opposition, stating the grounds thereof, to the Official Assignee not less than two days before the hearing of the application.

135. An insolvent shall not be entitled to have any of the costs of or incidenta to his application for his discharge allowed to him out of his estate.

136. (1) Where the Court grants an order of discharge conditionally upon the insolvent consenting to judgment being entered against him by the Official Assignee for the balance or the part of any balance of the debts provable under the insolvency which is not satisfied at the date of his discharge, the order of discharge shall not be signed, completed or delivered out until the insolvent has given the required consent in the Form No. 24, in the Appendix. The judgment shall be in the Form No. 25, in the Appendix, with such variations as circumstances may require.

(2) If the insolvent does not give the required consent within one month of the making of the conditional order, the Court may on the application of the Official Assignee revoke the order or make such other order as the Court may think fit.

137. The order of the Court made on an application for discharge shall be dated of the day on which it is made, and shall take effect from the day on which the order is drawn up and signed; but no office or certified copy of such order (save an office copy for the purposes of an appeal) shall be delivered out nor shall such order be gazetted until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the Appellate Court thereon. The order shall be in one of the Forms Nos. 26 and 27 in the Appendix as the case may require.

138. When the time for appeal has expired, or as the case may be, when the appeal has been decided by the Court, the Registrar shall forthwith send notice of the order to the Official Assignee, who shall cause the same to be gazetted.

138A. If the insolvent neglects to have the order for discharge drawn up, signed and filed within three months from the passing of the order, the same shall be liable to be rescinded on the application of the Official Assignee of a creditor who has proved or by the Court of its own motion.

139. (1) An application by the Official Assignee for leave to issue execution on a judgment entered pursuant to a conditional order of discharge shall be in writing, and shall state shortly the grounds on which it is made. When the application is lodged, the Registrar shall fix a day for the hearing.

(2) The Official Assignee shall give notice of the application to the debtor not less than eight days before the day appointed for the hearing, and shall, at the same time, furnish him with a copy of the application.

140. Where an insolvent is discharged subject to the condition that judgment shall be entered against him, or subject to any other condition as to his future earnings or after-acquired property it shall be his duty until such judgment or condition is satisfied, from time to time, to give the Official Assignee such information as he may require with respect to his earnings and after-acquired property and income, and not less than once a year to file with the Court a statement showing the particulars of any property or income he may have acquired subsequent to his discharge.

141. Any statement of after-acquired property or income filed by an insolvent whose discharge has been granted subject to conditions shall be verified by affidavit and the Official Assignee may require the insolvent to attend before the Court to be examined on oath with reference to the statements contained in such affidavit, or as to his earnings, income, after-acquired property or dealings. Where an insolvent neglects to file such affidavit or to attend the Court for examination when required so to do, or properly to answer all such questions as the Court may put or allow to be put to him the Court may, on the application of the Official Assignee, rescind the order of discharge. The affidavit shall be in the Form No. 28 in the Appendix, with such variations, as circumstances may require.

142. Where after the expiration of two years from the date of any order made upon an insolvent's application for a discharge, the insolvent applies to the Court to modify the terms of the order on the ground that there is no reasonable probability of his being in a position to comply with the terms of such order, he shall give fourteen days' notice of the day fixed for hearing the application to the Official Assignee and to all his creditors.

142A. Where an insolvent does not apply to the Court for his discharge under Section 38 of the Act for a period of eighteen months, from the date of the order of adjudication, the Court on the application of the Official Assignee or of a creditor may annul the adjudication or make such order as it may think fit.

142B. The Registrar shall fix a day for the hearing of any application to be made to the Court by the Official Assignee or by a creditor under Rule 142 A and notice of the intended application shall be given to the insolvent and also published in the Calcutta Gazette fourteen days before the day so fixed.

142C. A similar notice shall be given and published when the Court desires to proceed of its own motion under Section 41 of the Act.

● *Proxies and Voting Letters.*

143. (1) A general proxy shall be in the Form No. 29 a special proxy shall be in the Form No. 30 in the Appendix.

(2) A proxy shall be lodged with the Official Assignee not later than one clear day before the time appointed for the meeting or adjourned meeting, at which it is to be used.

(3) As soon as a proxy or voting letter has been used it shall be filed with the proceedings in the matter.

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144. A proxy given by a creditor shall be deemed to be sufficiently executed if it is signed by any person in the employ of the creditor having a general authority to sign for such creditor or by the authorized agent for such creditor if resident abroad. Such authority shall be in writing, and shall be produced to the Official Assignee if required.

145. The proxy of a creditor blind or incapable of writing in the English language may be accepted if such creditor has attached his signature or mark thereto in the presence of a witness, who shall add to his signature his description and residence and provided that all insertions in the proxy are in the hand-writing of the witness, and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark.

146. No person shall be appointed a general or special proxy who is a minor.

Proceedings by Company or Co-partnership.

147. An insolvency petition against any debtor to any company or co-partnership duly authorized to sue and be sued in the name of a public officer or agent of such company or co-partnership may be presented by or sued out by such public officer or agent as the nominal petitioner for and on behalf of such company or co-partnership on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorized to present or sue out such petition.

Proceedings by or against Firm.

148. Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name the partner signing for the firm shall add also his own signature, e.g., "Brown & Co. by James Green, a partner in the said firm."

149. Any notice or petition for which personal service is necessary, shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in Calcutta, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

150. Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name, the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

151. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

152. In cases of partnership the insolvents shall submit a schedule of their partnership affairs and each insolvent shall submit a schedule of his separate affairs.

Joint and Separate Estates.

153. The joint creditors and each set of separate creditors may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

154. Where proposals for compositions or schemes are made by a firm and by the partners therein individually, the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors, and the proposal made to each set of separate creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

155. If any two or more of the members of a partnership constitute a separate and independent firm the creditors of such last mentioned firm shall be deemed to be a separate set of creditors and to be on the same footing as the separate creditors of any individual member of the firm. And where any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Lunatics.

156. (1) Where it appears to the Court that any debtor or creditor or other person who may be affected by any proceeding under the Act or these Rules is a lunatic, not so found by inquisition (hereinafter called the lunatic), the Court may appoint such person as it may think fit to appear for, represent, or act for, and in the name of the lunatic, either generally, or in and for the purpose of any particular application or proceeding, or the exercise of any particular rights or powers which under the Acts and these Rules the lunatic might have exercised if he had been of sound mind. The appointment may be made by the Court either on an application made as herein-after mentioned, or, if the Court thinks fit to do so, without any previous application.

(2) An application to the Court to make an appointment under this Rule may be made by any person who has been appointed by any Court having jurisdiction so to do, to manage the affairs or property of, or to represent the lunatic or by any relative, or friend of the lunatic who may appear to the Court to be a proper person to make the application, or by the Official Assignee.

(3) The application may be made *ex parte* and without notice, but in any case in which the Court shall think it desirable, the Court may require such notice of the application as it shall think necessary to be given to the Official Assignee or to the petitioning creditor, or to the person alleged to be a lunatic, or to any other person, and for that purpose may adjourn the hearing of the application.

(4) Where the application is made by some person other than the Official Assignee, it shall be supported by an affidavit of a duly qualified medical practitioner as to the physical and mental condition of the lunatic. Where the application is made by the Official Assignee, it must be supported by a report of the Official Assignee, the contents of which shall be received as *prima facie* evidence of the facts therein stated.

(5) When a person has been appointed under this Rule, any notice under the Act and these Rules, served on or given to, such person shall have the same effect as if the notice had been served on or given to the lunatic.

PART III.

SPECIAL PROCEDURES.

Small Insolvencies.

157. An application by the Official Assignee that the estate of a debtor may be ordered to be administered in a summary manner shall be in the Form No. 31 in the Appendix, with such variations as circumstances may require.

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(1) There shall be no advertisement of any proceedings in a local paper unless the Registrar otherwise directs.

(2) The title of every document in the proceedings subsequent to the making of the order for summary administration shall have inserted thereon the words "Summary Case."

(3) On an application by an insolvent for his discharge the certificate of the Official Assignee shall not include, nor shall notices be sent to, creditors whose debts do not exceed Rs. 30.

(4) Notices of meetings or of sittings of the Court shall only be sent to creditors whose debts or claims exceed the sum of Rs. 30.

(5) The estate shall be realised with all reasonable despatch, and, where practicable, distributed in a single dividend when realised.

(6) The costs or charges of any person employed by the Official Assignee other than of an attorney may be paid and allowed without taxation where such costs or charges are within the prescribed scale.

Administration of Estate of Person dying Insolvent.

159. A creditor's petition under section 108 of the Act shall be in the Form No. 32 in the Appendix, with such variations as circumstances may require, and shall be verified by affidavit.

160. Where an administration order under section 108 of the Act is made, such order shall be gazetted and advertised in the same manner in all respects as an order of adjudication is gazetted and advertised.

161. The petition shall, unless the Court otherwise directs, be served on each executor who has proved the will or, as the case may be, on each person who has taken out Letters of Administration, or the legal representatives of the deceased. The Court may also, if the Court thinks fit, order the petition to be served on any other person.

162. An administration order under section 108 of the Act shall be in the Form No. 33 in the Appendix, with such variations as circumstances may require.

163. Where an administration order under section 108 of the Act has been made, it shall be the duty of the executor or legal representatives or representative of the deceased debtor to lodge with the Official Assignee forthwith (in duplicate) an account of the dealings with, and administration of (if any), the deceased's estate by such executor or legal representative or representative and such executor or legal representatives or representative shall also furnish forthwith in duplicate a list of the creditors and a statement of the assets and liabilities, and such other particulars of the affairs of the deceased as may be required by the Official Assignee. Every account, list and statement to be made under this rule shall be made and verified as nearly as may be in accordance with the practice for the time being in force on the Original Side of the Court.

The expense of preparing, making, verifying, and lodging any account, list and statement under this rule shall, after being taxed, be allowed out of the estate upon production of the necessary allocatur.

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164. In any case in which an administration order under section 108 of the Act has been made, and it appears to the Court, on the report of the Official Assignee, that no executor or administrator exists, the account, list and statement mentioned in the last preceding rule shall be made, verified, and lodged by such person as in the opinion of the Court, upon such report, may have taken upon himself the administration of, or may otherwise have intermeddled with, the property of, the deceased, or any part thereof.

165. In proceedings under an order for the administration of the estate of a person dying insolvent, where a meeting of creditors is summoned :—

(1) The provisions of schedule I of the Act relating to the mode of summoning a meeting of creditors, and to the persons entitled to vote at a meeting,

(2) The provisions of these rules, which refer to creditors, meetings of creditors, trustees, and committees of inspection, and

(3) Where the property is not likely to exceed in value, the sum of Rs. 3,000, the provisions of section 106 of the Act, shall, so far as applicable, apply as if the proceedings were under an order of adjudication.

PART IV.

OFFICERS, AUDIT, ETC.

Books to be kept and Returns to be made by the Registrar.

166. The Registrar shall keep books according to the Forms Nos. 34, 35 and 36 in the Appendix, and the particulars given under the different heads in such books shall be entered forthwith after the proceeding shall be had.

167. The Registrar shall make and transmit to the Chief Justice such extracts from his books, and shall furnish such information and returns as the Chief Justice may from time to time require.

Accounts and Audit.

168. The Official Assignee shall open an account with the Bank of Bengal entitled "The Account of the Official Assignee of Calcutta," and all moneys received by him in the realisation of insolvents' estates, shall, after deducting such sum as may be required for immediate payment of costs, charges, etc., within seven days after the receipt thereof, be paid into the credit of the said account.

General Rules, etc.

169. The Official Assignee shall invest all sums to the credit of the insolvent's estate as may not be required for the immediate payment of costs, expenses or dividends in the purchase of Government Promissory Notes, Bonds or Treasury Bills or in the Imperial Bank of India on fixed deposit receipt and forthwith deposit such Notes, Bonds, Bills or receipts with the Bank to the credit of such estate, respectively, at the expiration of each half year ending 31st January and 31st July, respectively.

170. The Official Assignee shall keep accurate accounts of the property, debts and credits of every insolvent and of all moneys received and payments made, which accounts any creditor shall be at liberty to inspect at all reasonable times.

171. The Official Assignee shall prepare a statement of Accounts of each estate not then wound up and fully distributed, that is to say, of the whole receipt, of the whole disbursements (distinguishing dividends from other payments), of the balance remaining and of the mode in and securities in which the balance is actually invested and at the foot thereof shall specify the amount of commission received by him during the half year.

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172. The Chief Justice shall from time to time appoint an Auditor or Auditors to examine half yearly up to the 31st day of January and the 31st day of July in every year the statement which the Official Assignee is required to prepare under Rule 171.

173. The Auditor or Auditors so appointed shall examine the said statement and the accounts of the Official Assignee and shall report thereon to the Chief Justice; and if during such audit any question or matter of difference shall arise between the Auditor or Auditors, and the Official Assignee in respect of any payment, receipt, voucher or otherwise, such question or matter of difference shall be referred to the Chief Justice or to such Judge as he may appoint to decide the same.

174. On completion of each audit, the statement above referred to shall be signed by the Auditor or Auditors and by the Official Assignee, and shall be published forthwith in the local official Gazette.

175. The Official Assignee shall open an account called "The Unclaimed Dividend Account" and shall from time to time transfer to the said account all dividends unclaimed within one year from the date of declaration of such dividends together with all sums standing to the credit of insolvents' estates in which no further recovery is anticipated and in which no dividend can be declared and all such other unclaimed balances whatsoever as may be in his hands by virtue of proceedings under the Indian Insolvency Act, 1848, or any other previous Insolvency Act, and invest all moneys standing to the credit of the account in $3\frac{1}{2}$ per cent. Promissory Notes of the Government of India or other securities of the Government of India.

176. The Official Assignee shall transfer the interest arising from such investment to an account called "The Unclaimed Dividend Revenue Account" and from the moneys at credit with such account, shall pay such fee not exceeding Rs. 1,000 for each audit as the Chief Justice shall consider reasonable together with such sums for stationery, wages and other office expenses as the Chief Justice may direct.

Security of Official Assignee.

177. The Official Assignee previous to his admission shall enter into a Bond with sufficient sureties to the Registrar in the penalty of Rs. 1,00,000 conditioned for the clear execution of his office.

Remuneration of Official Assignee.

178. The Official Assignee shall be entitled to retain as a remuneration for the duties to be performed by him:—

- (a) Such fees and percentages as may be chargeable by him under the Act and these Rules.
- (b) A commission of 5 per cent. on the principal amount or value of the assets collected by him in each estate and a commission of 1 per cent. on the value of assets taken charge of or collected by him as Interim Receiver.

Explanation.

For the purpose of this Rule the amount to be paid in pursuance of a composition or scheme of arrangement and also any amount realised under the Second Schedule to the Act shall be considered as assets collected by the Official Assignee.

Costs, charges, expenses etc., of the Official Assignee.

178A. At the hearing of any application under section 104 of the Act, at the instance of a creditor, the Court may direct the Official Assignee to appear, and in cases where such application is made by the Official Assignee the Court may direct that the Official Assignee shall be entitled to pay the costs and expenses of the application, including the lodging of the complaint mentioned in the said section, out of the "Unclaimed Dividend Revenue Account."

178B. Where the Official Assignee has been directed by the Court in the matter of any insolvency to institute legal proceedings of any kind whatsoever, he shall be entitled, so far as the assets in his hands relating to such insolvency are sufficient to meet the costs and expenses of such proceedings, to pay such deficiency out of the "Unclaimed Dividend Revenue Account."

178C. Where the Official Assignee while acting under the order and direction of the Court in the matter of any insolvency shall incur any personal liability and the assets in his hands relating to such insolvency are insufficient to meet such liability, he shall be entitled to apply to the Court for leave to pay any deficiency out of the "Unclaimed Dividend Revenue Account" and such leave shall be granted provided that the Official Assignee while so acting shall have complied with the order and direction of the Court.

178D. Where an insolvent estate has no available assets the Official Assignee shall not be required to incur any costs, charges or expenses in relation to such estate without the express direction of the Court, but the Court upon the application of the Official Assignee may from time to time empower him to apply any monies standing to the credit of the "Unclaimed Dividend Revenue Account" to an amount specified in the order of the Court, in payment of any costs, charges and expenses of or in connection with the realisation or administration of the estate of the insolvent.

178E. All sums advanced out of the "Unclaimed Dividend Revenue Account" under any of the foregoing rules shall be repaid out of any assets of the insolvent in priority to all other claims or charges.

Meeting of Creditors.

178F. Within fourteen days from the date of submission of the Insolvent's Schedule under section 24 of the Act, the Official Assignee shall, unless he has previously applied for an order for summary administration under section 105 (1) of the Act, apply to the Court for directions (1) whether a meeting of creditors should be summoned under section 26 of the Act, and (2) whether the creditors should be authorised to appoint a committee under section 88 of the Act. The application shall be made *ex parte*, but the Court may direct that notice thereof be given by post or otherwise to all or any of the creditors named in the Insolvent's Schedule or to any person who has tendered a proof or who appears to the Court to have intimated an intention to claim to be a creditor. The Court may by its order give directions as to the time and place of the meeting of creditors or any other incidental matters, but save for special reason to be recorded no creditor or other person shall be given any costs in respect of the said application for directions.

Committee of Inspection.

179. In any case in which the Court authorises the creditors to appoint a Committee of Inspection pursuant to section 88 of the Act, the creditors qualified to vote may at a meeting duly convened for the purpose by resolution appoint from among the creditors or the holders of general proxies or general-powers of attorney from such creditors a Committee of Inspection for the purpose of superintending the administration of the insolvent's property by the Official Assignee. The Committee of Inspection shall consist of not more than five, nor less than three persons.

180. A Committee of Inspection shall meet at such time as they shall from time to time appoint and failing such appointment at least once a month; and the Official Assignee or any member of the Committee may also call a meeting of the Committee as and when he thinks necessary.

181. The Committee of Inspection may act by a majority of their members present at a meeting, but shall not act unless a majority of the Committee is present at the meeting.

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182. Any member of the Committee may resign his office by notice in writing signed by him and delivered to the Official Assignee.

183. If a member of the Committee becomes insolvent or compounds or arranges with his creditors, or is absent from five consecutive meetings of the Committee his office shall thereupon become vacant.

184. Any member of the Committee may be removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given stating the object of the meeting.

185. On a vacancy occurring in the office of a member of the Committee, the Official Assignee shall forthwith summon a meeting of creditors for the purpose of filling the vacancy and the meeting may by resolution appoint another creditor or other person eligible as above to fill the vacancy.

186. The continuing members of the Committee, provided there be not less than two such continuing members, may act notwithstanding any vacancy in their body, and where the number of members of the Inspection Committee is for the time being less than five, the creditors may increase that number so that it does not exceed five.

187. When a Committee of Inspection has been appointed under section 88 of the Act, the Official Assignee shall in the administration of the property of the insolvent and in the distribution thereof, amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the Committee of Inspection, and any directions so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the Committee of Inspection.

188. When a Committee of Inspection has been appointed under section 88 of the Act, the Official Assignee shall obtain the consent of the Committee before applying to the Court for leave to do any of the things for which such leave is required by section 68 of the Act.

189. No defect or irregularity in the appointment or selection of a member of a Committee of Inspection shall vitiate any act done by him in good faith.

190. The Official Assignee shall submit the record book and cash book together with any other requisite books and vouchers, to the Committee of Inspection (if any) when required, and not less than once every three months.

191. The Committee of Inspection shall, not less than once every three months, audit the cash book and certify therein under their hands the day on which the said book was audited. The certificate shall be in the Form No. 37 in the Appendix, with such variations as circumstances may require.

192. Neither the Official Assignee nor any member of the Committee of Inspection of an estate shall, while acting as Official Assignee or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule, may be set aside by the Court either on its own motion or on the application of any person interested.

193. No member of a Committee of Inspection of an estate shall, except under and with the sanction of the Court directly or indirectly, by himself or any employer, partner, clerk, agent or servant, be entitled to derive any profit from any transaction arising out of the insolvency or to receive out of the estate any payment for services.

rendered by him in connection with the administration of the estate, or for any goods supplied by him to the Official Assignee for or on account of the estate. If it appears to the Court that any profit or payment has been made contrary to the provisions of this rule, the Court may disallow such payment or recover such profit as the case may be on the audit of the Official Assignee's account.

194. When the sanction of the Court under the last preceding rule to a payment to a member of a Committee of Inspection for service rendered by him in connection with the administration of the estate is obtained, the order of the Court shall specify the nature of the services, and shall only be given where the service performed is of a special nature. No payment shall under any circumstances be allowed to a member of a Committee for services rendered by him in the discharge of the duties attaching to his office as a member of such Committee.

195. Where the Official Assignee carries on the business of the debtor, he shall keep a distinct account of the trading and shall incorporate in the cash book the total weekly amount of the receipts and payments on such trading account.

196. The trading account shall from time to time and not less than once in every month be verified by affidavit, and the Official Assignee shall thereupon submit such account to the Committee of Inspection (if any) or such member thereof as may be appointed by the Committee for that purpose, who shall examine and certify the same.

196A. Unless otherwise directed or resolved by the Committee of Inspection or ordered by the Court, the Official Assignee shall not engage an auctioneer to sell the insolvent's property.

Disclaimer of Lease.

197. (1) A lease may be disclaimed without the leave of the Court in any of the following cases, viz. :—

- (i) Where the insolvent has not sub-let the demised premises or any part thereof or created a mortgage or charge upon the lease ; and
 - (a) The rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than Rs. 300 per annum ; or
 - (b) The estate is administered under the provisions of section 106 of the Act, or
 - (c) The Official Assignee serves the lessor with notice of his intention to disclaim, and the lessor does not, within seven days after the receipt of such notice, give notice to the Official Assignee requiring the matter to be brought before the Court.
- (ii) Where the insolvent has sub-let the demised premises or created a mortgage or charge upon the lease and the Official Assignee serves the lessor and the sub-lessee or the mortgagees with notice of his intention to disclaim, and neither the lessor nor the sub-lessee or the mortgagees or any of them, within fourteen days after the receipt of such notice, require or requires the matter to be brought before the Court.

(2) The notices shall be in the Forms Nos. 38, 39, 40 and 41 in the Appendix, with such variations as circumstances may require.

(3) Except as provided by this Rule, the disclaimer of a lease without the leave of the Court shall be void.

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(4) Where the Official Assignee disclaims a lease-hold interest he shall forthwith file the disclaimer with the proceedings in the Court; and the disclaimer shall contain particulars of the interest disclaimed, and a statement of the persons to whom notice of the disclaimer has been given. Until the disclaimer is filed by the Official Assignee, the disclaimer shall be inoperative.

(5) Where, in pursuance of notice by the Official Assignee of his intention to disclaim a lease-hold interest the lessor, sub-lessee, or mortgagee requires the Official Assignee to apply to the Court for leave to disclaim, the costs of the lessor, sub-lessee, or mortgagee shall not be allowed out of the estate of the insolvent, except in cases in which the Court is satisfied that such application was necessary in order to do justice between the parties.

(6) A disclaimer made without leave of the Court under this Rule shall not be void or otherwise affected on the ground only that the notice required by this rule has not been given to some person who claims to be interested in the demised property.

(7) Where any person claims to be interested in any part of the property of the insolvent burdened with onerous covenants, he shall, at the request of the Official Assignee, furnish a statement of the interest so claimed by him.

PART V.**MISCELLANEOUS.***Miscellaneous Matters.*

198. The Court may, from time to time, issue general orders or regulations for the purpose of regulating any matters under the Act or these Rules, which are of an administrative character.

199. (1) Any person who knowingly falsifies or fraudulently alters any document in or incidental to any proceedings under the Act or these Rules shall be deemed to be guilty of contempt of Court and shall be liable to be punished accordingly.

(2) The penalty imposed by this rule shall be in addition to, and not in substitution for, any other penalty, punishment, or proceeding to which such person may be liable.

200. Non-compliance with any of these Rules or with any Rule of Practice for the time being in force shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

201. The Court may, under special circumstances and for good cause shown, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.

202. All Rules and Orders made under the Indian Insolvency Act, 1848, are hereby annulled, except so far as regards any proceedings under the said Act, which may be pending in the Court at the date of coming into operation of these Rules.

Practice and Procedure.

203. Where no other provision is made by the Act or these rules, the Court shall have the like power and follow the like procedure as it has and follows in the exercise of its Ordinary Original Civil Jurisdiction, in so far as the same may be applicable; and where no such procedure exists, the practice and procedure obtaining in the English Bankruptcy Court, so far as they are applicable and not inconsistent with the Act or these rules, shall be followed with such modifications as may be called for by the circumstances of each case.

204. Fees Prescribed.—The charges to be made by the attorneys in their bills of costs shall be according to the table of charges annexed to these rules; and every insolvent, if appearing in person, and every attorney shall be responsible to the officers of the Court and to the Sheriff for the fees prescribed by these rules; and the like proceedings shall be had to enforce payment thereof as are had in this Court in its Original Jurisdiction.

Table of Fees.

OFFICERS' FEES.

<i>Registrar.</i>	<i>Rs.</i>	<i>a.</i>	<i>p.</i>
For filing petition, including entry of the same in the record book	1	0	0
For filing Schedule	1	0	0
For every other document which is required to be filed	0	8	0
For minuting in the minute book every rule and proceeding, and for every copy thereof, each, per folio of 90 words	0	5	0
For the drawing and fair copying of every warrant to the Sheriff to bring up a prisoner or to discharge, release, or further imprison him, and of interim and other orders, each, per folio	0	10	0
For office copies of all proceedings or accounts, per folio	0	5	0
For every certificate	1	0	0
For each search in his office in answer to enquiry	1	0	0
For reading and marking every exhibit or other proceeding read in Court ..	0	8	0
For each subpoena	1	0	0
For entering notice of opposition	0	8	0
For entering a case in the list of cases for each day's hearing	1	0	0
For every attendance before the Court with records, books or papers, by order of the Court or a Judge, or at the request of any party	2	0	0
For calling on each case to be heard	1	0	0
For every precept	1	0	0
For investigations or taking of accounts and other matters referred by the Court, and for reporting thereon to the Court, for each hour employed thereon	16	0	0
For investigations or taking of accounts and other matters referred by the Court, and for reporting thereon to the Court, for less than an hour ..	10	0	0
For taking down deposition or examination of an insolvent or a witness, per folio	0	5	0
To any Commissioner for taking any affidavit at the jail (including attendance and explanation)	8	0	0

The Taxing Officer and Commissioners.

For taxing every bill of costs, if the amount be less than two hundred rupees ..	5	0	0
If two hundred or more, then for each hundred	3	0	0
For every summons	2	0	0
For every certificate	1	0	0
For every oath administered and affidavits sworn	1	0	0
For every office copy when required, per folio	0	5	0

Translator and Interpreter's Fees.

For translation, per folio	1	0	0
For every oath administered to the insolvent or witnesses, each	1	0	0

*The Sheriff.***Rules—P-t. I. A.**

Calcutta		Rs.	a.	p.
For bringing of each insolvent or witness before the Court or a Judge, or before Examiner or Registrar under order	2	0	0	
For filing all Warrants and Orders	1	0	0	
For every search in his office	1	0	0	
For every certificate	1	0	0	

Attorney's Fees.

Attendance in prison, taking instructions for petition	6	9	0	
Notice to Sheriff and service	2	0	0	
Drawing and engrossing petition	3	0	0	
Attending to lodge or file petition with accompanying documents	3	5	0	
Attendance in prison, taking instructions for Schedule	6	9	0	
Drawing Schedule, per folio of 90 words	0	9	0	
When the number of debtors exceeds 20, then for the excess above 20, per folio only 5 annas, viz., two words to be computed as one	0	5	0	
Engrossing Schedule of affairs and duplicate thereof, per folio	0	5	0	
Fair copy for prisoner if required, per folio	0	5	0	
Drawing and engrossing petition and affidavit for leave to file petition or Schedule (time being passed) or the protection or discharge	4	0	0	
All attendances relating to any application to the Court	6	9	0	
Attending at prison, reading over and attesting Schedule	7	9	0	
Attending to file Schedule	3	5	0	
Attending insolvent for his books and endorsing the same and lodging them at the office of the Official Assignee	3	5	0	
Copies of order to serve or annex, and examining including letters of service by the post, and attending at the Post Office to put in the same, each	0	5	0	
Searching with the Sheriff, for detainers	2	7	0	
Searching for notice of opposition	2	7	0	
Attending Court on days of hearing	6	9	0	
Attending for order of adjudication and delivering the same to the insolvent.	2	7	0	
Drawing and engrossing affidavit of service of notice, per folio	0	5	0	
Drawing and engrossing other affidavits than abovementioned, per folio	0	9	0	
Taking instructions for brief, for insolvent	3	5	0	
Taking instructions for special affidavits	3	5	0	
Instructing Counsel on motion	3	5	0	
Drawing brief for insolvent, per sheet of 10 folios	5	0	0	
Fair copying brief for insolvent, per sheet of 10 folios	2	7	0	
Attending Counsel, Court on motion, and other necessary attendance, not otherwise mentioned	3	5	0	
Copy and service of rules within Calcutta	3	0	0	
Writing and sending letters when absolutely necessary	2	7	0	
Drawing advertisements	2	7	0	
Fair copy advertisements, for printer	1	0	0	
Bills of costs, with copies and getting the same taxed with affidavit and all expenses and attendance thereon, but not including the Officer's fees in each case	5	0	0	
Ditto on further taxation after hearing	1	7	0	
Letters, messages, stationery, etc., not otherwise charged	2	0	0	

PRESIDENCY-TOWNS INSOLVENCY RULES, CALCUTTA. 831

Rules—P.-t. I. A.

Table of fees under the Old Act not incorporated in this table as being no longer applicable. **Calcutta**

OFFICERS' FEES.

Registrar.

	Rs.	s.	p.
For preparing every notice and advertisement, per folio, including sending the same to the Gazette	0	5	0
For making a fair copy of deposition in Court (besides parchment) per folio.	0	5	0

The Sheriff.

For every warrant to the Jailor to discharge a defendant	1	0	0
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The Gaoler.

For every certificate	1	0	0
For attending with a prisoner before the Court or a Judge, or before any Officer to whom the Court shall refer any matter for investigation or order ..	1	2	0
For forms to prisoner, assistance in filling up attestation, delivery and as in rule mentioned	16	0	0

The Messenger.

For every service by the general post	0	2	0
For serving each notice in Calcutta or within five miles thereof	0	12	0

The Broker.

For valuing, appraising and certifying the expected articles, if within five miles of Calcutta	16	0	0
For every additional mile he shall travel beyond that distance	1	0	0

**MADRAS RULES MADE UNDER THE PRESIDENCY-TOWNS INSOLVENCY
ACT, III OF 1909.**

ORDER I.

Preliminary.

Rules—P.-t. I. A.

Madras

1. These rules may be called the Insolvency Rules, 1910, and shall come into force on the first day of April, 1910.
2. The forms in Appendix II hereto shall be used with such variations as circumstances may require.
3. All previous rules are hereby repealed and superseded except as regards proceedings pending on the 1st day of April, 1910.
4. In these rules, unless there is something repugnant in the subject or context—
 - (1) "The Act" means the Presidency-towns Insolvency Act, 1909.
 - (2) "Court" includes the Judge assigned for the purpose of exercising jurisdiction under the Act and the officer appointed to exercise any of the powers of the Court when exercising the same.
 - (3) "Registrar" includes a "Deputy Registrar" and "Assistant Registrar."
 - (4) "The Registrar of the High Court" for the purpose of Order XVII and Appendix IV (2) means "The Chief Ministerial Officer of the High Court appointed by the Chief Justice under clause 8 of the Amended Letters Patent."

Form and Presentation of Proceedings.

5. All petitions, schedules, affidavits, applications and other proceedings presented to the Court, shall be written, type-written, or printed, fairly and legibly, on substantial white foolscap folio paper, with an outer margin about two inches wide, and an inner margin about one inch wide, and separate sheets shall be stitched together bookwise. The writing or printing shall be on both sides of the paper, and numbers shall be expressed in figures.

6. Every proceeding shall be headed with a cause-title in Form No. 1. A petition instituting proceedings in a matter shall, on presentation to the Court, be assigned a distinctive number by the Registrar, and all subsequent proceedings in the same matter shall bear the same number.

7. The first proceedings filed by any party shall state an address for service, which shall be within the local limits of the jurisdiction of the Court. Except where the petitioner appears in person, every petition shall be attested by the signature of the attorney of the petitioner.

8. Except in case of urgency, all petitions, applications, affidavits, proceedings and documents intended to be filed in Court, shall be presented to the Registrar at any time during office hours. In all cases of doubt, he shall refer the matter to the Court. In case of urgency, any proceeding or document may be presented to the Judge.

Notice.

9. All notices and other documents for the service of which no special mode is directed may be sent by post by prepaid registered letter to the last known address of the person to be served therewith.

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10. Any notice of an order of the Court which is directed by the Act or these rules to be published and notice of the date appointed for the public examination of an insolvent, shall be published by affixture to the Court notice-board, in addition to the publication so directed.

11. When the Court directs that notice should be served on the insolvent to show cause why a charge or charges should not be framed against him for any offence, or offences under section 103 of the Act such notice shall be served by the Sheriff or through the local Courts as the case may be in the manner prescribed by the Rules of the High Court for service of a summons to a defendant in a suit,

Execution of Process.

12. It shall be the duty of the Sheriff to serve such notices, summonses, petitions and orders as these rules or the Court in any particular proceeding may require him to serve to execute warrants and other process, and to do all such things as may be required of him by the Court.

ORDER II.*Court and Chambers.*

13. Except in the case of small insolvencies, the following matters and applications shall be heard and determined in open Court :—

- (a) Application for an order of adjudication upon a creditor's petition ;
- (b) Application for the annulment of an order of adjudication or for an order of discharge or for the revocation or suspension of an order of discharge ;
- (c) The public examination of insolvents ;
- (d) Applications to set aside or avoid any transfer of property, security, obligation or payment made, given or incurred by an insolvent or to declare for or against the validity of any judicial proceeding taken or suffered by an insolvent, or for or against the title of the Official Assignee to any property adversely claimed ;
- (e) Applications for injunction ;
- (f) Applications for the committal of any person to prison for contempt or otherwise or for the release of any person so committed ;
- (g) Applications to expunge, or reduce a proof, where the amount in dispute exceeds Rs. 1,500 ;
- (h) Applications to review, rescind or vary any order made in Court ;
- (i) Appeals from decisions of the Official Assignee ;
- (j) Hearing under section 104 (3) ;
- (k) Hearing under section 108 (2) ;
- (l) Appeals from the officer empowered under S. 6.

14. The following matters and applications may be heard and determined in Chambers :—

- (a) Application for orders of adjudication upon the petitions of debtors ;
- (b) Applications for orders for summary administration ;
- (c) All proceedings in small insolvencies, except applications for orders of discharge ;
- (d) Applications for the appointment of the Official Assignee to be interim receiver ;
- (e) Applications to stay proceedings against a debtor ;
- (f) Applications for the appointment of a special manager ;
- (g) Applications for or to rescind protection orders ;

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- (A) Applications to extend the time for taking any proceeding or doing any act ;
- (i) Applications to sanction or annul composition or scheme of arrangement ;
- (j) All other matters and applications except those mentioned in Rule 13 :

Provided that the Judge may, at any time adjourn any application or matter from chambers to Court or from Court to chambers.

Any matter which the Deputy Registrar, Original Side, empowered under S. 6 of the Act has jurisdiction to determine shall be adjourned to be heard by a Judge :

- (a) If all the parties require it ;
- (b) If any party or applicant on an ex parte application requires it and the Deputy Registrar thinks that it involves a question of difficulty on the ground of novelty or otherwise.
- (c) If the Judge by general or special order so directs.

15. Applications in chambers shall be made by Judge's summons, and applications in Court shall be made by notice of motion in manner prescribed by the Rules of the High Court.

ORDER III.**PETITIONS FOR ORDERS OF ADJUDICATION.***Petition by a Debtor.*

16. The petition of a debtor shall state his residence, or place of business or employment, his occupation, the amount of his debts, that he is unable to pay them, the cause of his insolvency, and any facts relied upon by him as giving jurisdiction to the Court to make an order of adjudication.

17. A petition by a debtor shall be verified by the petitioner, or by his duly authorized agent, in the manner prescribed by the Rules of the High Court, 1902, in the case of a plaintiff.

18. If the debtor has been arrested and imprisoned in execution of a decree, or an order of attachment has been made, and is subsisting against his property, the petition shall give the particulars of the decree and order under which process has been issued.

19. If the debtor has presented any previous petition in insolvency, or has had an order of adjudication passed against him, the petition shall also state the particulars thereof, including the serial number of the petition and the manner in which the same was disposed of.

Petition by a Creditor.

20. The petition of a creditor shall state the amount of the debt owing to him, or if there are several petitioners, to each of them and when the same is payable, and the act of insolvency on which the petition is grounded and the date thereof.

21. If the petitioner is a secured creditor, he shall give full particulars of his security and value the same.

22. A creditor shall, together with his petition, bring into Court two copies thereof for service upon the debtor and the Official Assignee. The Registrar shall endorse the date of presentation on the petition and shall post it before the Court on the next Court day after presentation.

23. If the Court orders the petition to be served upon the debtor, the Registrar shall endorse upon the copy thereof the date of presentation and the date appointed for the further hearing and the same shall be served upon the debtor by the sheriff, or through

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the local Court as the case may be, in the manner prescribed by the Rules of the High Court for service of a summons to a defendant in a suit. If the Court does not order service of the petition and an order of adjudication is made, unless the Court otherwise orders, a certified copy of the order shall be taken out by the petitioner and served upon the debtor in the same manner, and a copy of the petition filed in Court shall be delivered out to the debtor on his application.

24. The signature of the person served shall be taken upon a memorandum of acknowledgment of service in Form No. 5.

25. If the debtor is not resident within the local limits of the jurisdiction of the Court, service may be made by the petitioner or his attorney or by some person in his employ.

26. If an order of adjudication is made without service of the petition, the debtor may within eight days after service of the order, or such further time as may be allowed by the Court, apply by notice of motion supported by affidavit to annul the order.

Schedule of Affairs.

27. The schedule of the debtor's affairs shall be in Form No. 6 and shall be written on a printed form. If the debtor appears by an attorney, the schedule shall be attested by him.

28. Unless otherwise ordered, the insolvent shall within the period prescribed for filing his schedule in Court file a copy thereof with the Official Assignee.

29. Unless the Court otherwise orders, the debtor shall together with his schedule bring into Court a notice to each of his creditors in Form No. 2, and where notice is to be served by post, or by a local Court or authority the prescribed fee for service.

30. If a schedule is amended the Registrar shall send it to the Official Assignee, who shall return it after noting the amendment.

31. The affidavit prescribed by S. 24 (1) of the Act shall be made by the debtor, or with the leave of the Court, by some other person on his behalf having knowledge of the facts.

32. Unless otherwise ordered, the debtor shall within the time prescribed for filing his schedule, file with the Official Assignee an inventory and appraisalment of any property which he claims to be exempt from division among his creditors, stating its estimated value.

33. If the insolvent fails to prepare and submit his schedule in the manner prescribed by the Act and these rules, the Official Assignee shall take the orders of the Court with a view to such advertisement for creditors as may be necessary and he shall likewise from the materials in his possession prepare and submit to the Court a schedule of the insolvent's affairs as near as may be in Form No. 6.

Application for Protection.

34. An application by an insolvent for protection shall be served upon the Official Assignee and the detaining creditor, if any, and upon such other creditors as the Court may direct.

35. The application shall be supported by an affidavit stating whether any and what process has been issued against the insolvent for his arrest, and in respect of which of his debts, whether he is personally engaged in any and what business or employment and the amount of his earnings or salary.

36. If an order of protection is recalled or revoked by the Court, the insolvent shall forthwith bring into Court any copy thereof which shall have been furnished to him by

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the Registrar, or shall file an affidavit accounting for its non-production ; and in case of default, the Registrar shall post the petition before the Court for orders, and thereupon the Court may dismiss the petition or make such other order as it thinks fit.

ORDER IV.*Proceedings when the Insolvent is in Gaol.*

37. When the debtor is in gaol, these rules shall be subject to the following modifications.

38. The petition of the debtor shall be forwarded by the Gaoler in charge of the Civil Debtor's Gaol to the Registrar together with a certificate of the cause and period of detention of the insolvent.

39. Where a creditor applies for an order of adjudication against a prisoner, the Registrar shall transmit the copy of the petition to the Gaoler for service on the petitioner.

40. If an order of adjudication is made, the Registrar shall give notice of the date of the order and of the day fixed for the public examination of the insolvent to the insolvent and the detaining creditor, and the Gaoler shall produce the insolvent before the Court on the last mentioned day.

41. On the application of the Official Assignee, or the insolvent, or a creditor, or for the purpose of any hearing, the Registrar may issue an order to the Gaoler to produce a prisoner before the Official Assignee or the Court. If the hearing is adjourned, the Registrar shall endorse on the order a direction to the Gaoler to produce the prisoner on the adjourned day. The application of a prisoner shall be sent by the Gaoler to the Registrar.

42. Service of all notices, petitions and processes upon a prisoner shall be made by delivering the same to the Gaoler, whose receipt thereof shall be sufficient proof of service on the prisoner.

ORDER V.*Proceeding by or against a Firm.*

43. When any petition, notice or other document is signed by a firm of creditors or debtors in the firm's name, the partners signing for the firm shall add also his own signature in the following manner, "B. & Co., by A. B., a partner in the said firm."

44. Any petition or notice of which personal service is necessary shall be duly served on all members of the firm, if it is served at the place of business of the firm in India upon any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

45. When a firm of debtors files an insolvency petition, the same shall contain the names in full of the individual partners, and, unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same.

46. When a creditor files an insolvency petition against a firm, the same shall state the names of the individual partners so far as the same are known to the petitioner, and the debtors shall together with their schedule of affairs file an affidavit setting out the names in full of the individual partners.

47. An order of adjudication shall be made against the partners individually.

48. The debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs.

ORDER VI.

Proceedings Subsequent to Adjudication.

49. The Official Assignee shall hold a personal interview with the insolvent for the purpose of investigating his affairs, and shall examine him with respect to his property, and credits, and the debts due by him, and the causes of his insolvency.

49A. If, on examining the insolvent, the Official Assignee is satisfied that he is unable to pay the fees payable to the Court and to the sheriff under items Nos. 2, 3, 26 and 28 of Appendix III of the said rules, he shall give the insolvent a certificate to that effect, and the Deputy Registrar, Original Side, shall, on production by the insolvent of the said certificate, order that the said fees shall not be levied.

49B. The Deputy Registrar and the Sheriff shall make a return to the Official Assignee of the fees which would have been paid by the insolvent if the Official Assignee had not given him the certificate in the above rule mentioned. The Official Assignee shall thereupon debit the said fees to the estate in his accounts and the fees so debited shall form a first charge on the assets of the said insolvent.

49C. When a petition is dismissed, the Court shall order the insolvent to pay the fees which would have been paid by the insolvent but for rule 49-A.

50. At the request of the Official Assignee, the insolvent shall furnish him with trading and profit and loss accounts, and a cash and goods account, for such period, not exceeding two years prior to the date of the order of adjudication, as the Official Assignee shall specify :

Provided that the Court may order the insolvent to furnish such other or further accounts, and for such period, as it thinks fit.

51. Meetings of the creditors under the rules prescribed in the first schedule to the Act shall be held at the chambers of the Official Assignee, or at such other place as in his opinion is most convenient, and the instrument of proxy referred to in the said schedule shall be in Form No. 7.

52. At the meeting of creditors, the Official Assignee shall inform the creditors of the result of his personal interview with the insolvent, and make such observation upon the schedule filed by the insolvent, his accounts, the causes of his insolvency, the administration of his estate, and the affairs of the insolvent generally, as he may think fit, and may put to him any questions suggested by the creditors with respect to the said matters.

53. The Official Assignee may also take the opinion of the creditors as to the best method of realizing the property and credits of the insolvent, and of administering his estate : in case of difference of opinion, he may take the votes of the creditors.

54. Where an insolvent submits a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs such proposal shall be in Form No. 8 or Form No. 9, as may be appropriate. The Official Assignee shall give notice of meeting for the purpose of considering the proposal in Form No. 10 and the assent or dissent of any creditor who is not present at the meeting may be given by letter in Form No. 11.

55. If there are no available assets for taking any proceedings necessary for the administration of the estate, or otherwise, the Official Assignee may call upon the creditors to advance the necessary funds, or to indemnify him against the costs of such proceedings. Any assets realised by such proceedings shall be applied, in the first place, towards the repayment of the said advances, with interest thereon at 6 per cent. per

Rules—P-t. I. A.**Madras***Committee of Inspection.*

56. When the Court authorizes the appointment of a Committee of Inspection, such appointment shall be made by a meeting of creditors and rules 51, 52, 53 and the rules in the first schedule to the Act shall be observed with respect to the summoning of and proceedings at such meeting.

57. The committee shall consist of not less than three and not more than five members.

58. The committee shall have such powers of control over the Official Assignee in the administration of the estate as the Court making the appointment may direct.

Special Manager.

59. Unless otherwise ordered, the Official Assignee shall, before appointing the insolvent for any of the purposes in Section 75 of the Act mentioned, submit the matter and the terms of the proposed appointment to a meeting of the creditors. If the majority in number and three-fourths in value of the creditors who attend the meeting do not approve of the proposals of the Official Assignee, he may inform them that he intends to take the orders of the Court thereon on a specified day, and may move the Court accordingly, and no further notice to the creditors shall be necessary.

60. A special manager shall furnish to the Official Assignee accounts (to be verified by affidavit) of all moneys and property received and disbursements made by him. The Official Assignee may, if he thinks desirable, have such accounts audited at the expense of the estate, and when the said accounts have been approved by the Official Assignee the totals shall be added to his account.

61. If any question arises as to the accounts or conduct of a special manager, the Official Assignee may report the matter to the Court, and thereupon the Court may deal therewith in the same manner as if the special manager were a receiver appointed by the Court.

ORDER VII.*Notice of Orders of Adjudication and of the Public Examination of Insolvents.*

62. The day for the public examination of an insolvent shall be fixed by the Registrar with reference to the number and residence of the creditors, and shall ordinarily be not less than six, nor more than twelve weeks from the date of the order of adjudication.

63. Notice of the order of adjudication and of the day so appointed shall ordinarily be given by serving a notice in Form No. 2 upon each of the creditors of the insolvent.

64. The notice shall be served as follows :—

(1) If the person to be served resides or carries on business within the local limits of the jurisdiction of the Court, the notice shall be served by an officer of the Sheriff by delivering the same to such person personally, or to an adult male at the house or place of business of such person. Provided that where any person keeps his house or place of business closed in order to prevent the officer from serving the notice, or is otherwise endeavouring to evade service of notice, it shall be sufficient service to affix the same on the door of such house or place of residence or business ;

(2) If the person to be served resides or carries on business beyond the said limits, the notice may be served by sending it in a pre-paid registered envelope addressed to him at his place of residence or business ;

(3) In place of, or in addition to, service in manner aforesaid, service of notice may, if the Registrar so directs, be effected by advertisement in one or more newspapers published in or circulating at, the place where the person to be served resides or carries on business for such period and at such intervals as the Registrar may direct.

65. Service of notice under the preceding rule shall be proved, under sub-rule (1) by the affidavit of the serving officer in Form No. 3, under sub-rule (2) by the affidavit of the insolvent or his attorney or by some person in his employ that the notice has been duly posted and by the production of the receipt and acknowledgment of the addressee furnished by the post office; and under sub-rule (3) by the production of a copy of the newspaper in which publication has been directed.

(1) The insolvent or his agent shall attend the officer of the Sheriff, and point out and identify the person to be served with notice, and the affidavit of service shall state by whom he was identified, and the manner of service, as in Form No. 3.

(2) The officer shall also take the signature of the person served on a memorandum of acknowledgment in Form No. 4 and the same shall be filed with the affidavit of service as an Exhibit.

(3) Where service has been effected by an officer of the Sheriff, if the insolvent appears in person, the affidavit of service shall be prepared and filed in Court by the Sheriff; if he appears by an attorney, the work may be done by the attorney.

66. (1) Affidavits of service shall be filed in Court not less than three days before the day appointed for the public examination of the insolvent.

(2) If the affidavit is to be prepared by the Sheriff and is not ready to be filed before the said period, the Sheriff shall report to the Registrar the reason for the delay, and whether it is due to the neglect or default of the insolvent or any other person.

67. If the Registrar is of opinion that service of notice has not been duly proved, he may call upon the insolvent to furnish further evidence of the residence or place of business of the person to be served, and may examine the insolvent or any other person on oath or solemn affirmation with respect thereto, and may direct the insolvent to bring in a fresh notice and that the same be served personally by the local Court or by the insolvent or his Attorney, or be served by advertisement under sub-rule (3) of rule 64, or give such directions as he may think fit.

68. If the Registrar is of opinion that the notice has been sufficiently published, he may dispense with service of notice upon any creditor, or may refer the matter to the Court for orders.

69. Within 10 days after service of the notice mentioned in rule 63 upon him, or such further time as may be allowed by the Court, any creditor may apply that an adjudication may be annulled. The application shall state shortly the grounds upon which it is made and shall be served upon the insolvent not less than 3 days before the return day.

ORDER VIII.

Discharge of Insolvent.

70. An application by an insolvent for an order of discharge shall be made by notice of motion, and a copy thereof shall be served by the insolvent upon the Official Assignee not less than 8 weeks before the day appointed for the hearing. Notice of the day appointed shall be published by the Registrar by affixture to the Court notice board, and by the Official Assignee by sending notice by post to the creditors who have proved. Unless the Court otherwise orders the application shall be made within 3 months from

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Madras the declaration of the first dividend, or if the Official Assignee shall report to the Court that the assets do not admit of the declaration of a dividend, within 6 months from the order of adjudication.

71. If the Court refuses the discharge, a fresh application for discharge shall not be made unless otherwise ordered until the expiration of one year from the date of the order of refusal, and notice of the application for leave to apply for a discharge shall also be served upon any creditor who has opposed the discharge of the insolvent.

72. Any creditor who intends to oppose the discharge of an insolvent shall give notice of the intended opposition in Form No. 13, stating the grounds thereof, to the debtor, the Official Assignee and the Registrar not less than 5 days before the day appointed for the hearing of the application.

73. The order for discharge of an insolvent shall not be delivered out until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the appellate Court thereon. When the time for appeal has expired, or the appeal has been decided, the Official Assignee shall publish notice of the discharge in the *Fort St. George Gazette*.

74. An application by an insolvent to modify the terms of a conditional order of discharge shall be made by notice of motion which shall be served upon the Official Assignee and any creditor who has opposed his discharge not less than 5 days before the day appointed for the hearing.

75. (1) When the Court grants an order of discharge conditionally upon the insolvent consenting to a decree being passed against him in favour of the Official Assignee, the order of discharge shall not be signed and completed until the insolvent has given the required consent in Form No. 14.

(2) If the insolvent does not give the required consent within one month of the making of the conditional order, the Court may, on the application of the Official Assignee, revoke the order or make such other order as the Court may think fit.

(3) The Official Assignee shall file a copy of the order of discharge and the consent of the insolvent with the Registrar of the High Court who shall draw up and register a decree of Court in accordance therewith.

76. An application by the Official Assignee for leave to issue execution on the decree shall be in writing and shall state shortly the grounds on which it is made, and the Registrar shall fix a day for the hearing. The Official Assignee shall serve a copy of the application upon the insolvent not less than 5 days before the day fixed.

77. When an insolvent is discharged subject to the condition that a decree shall be passed against him, or subject to any other condition as to his future earnings or income or after-acquired property, it shall be his duty until such decree or condition is satisfied, from time to time to give the Official Assignee such information as he may require with respect to his earnings, income and after-acquired property and not less than once a year to send to the Official Assignee a statement verified by affidavit showing the particulars of any property or income he may have acquired subsequent to his discharge.

78. The Official Assignee may require the insolvent to attend before the Court to be examined with reference to the statement, or as to his earnings, income, or after-acquired property. If the insolvent neglects to send such statement to the Official Assignee, or to attend before the Court for examination, or properly to answer all questions put to him, the Court may, on the application of the Official Assignee, rescind the order of discharge.

ORDER IX.*Discovery of Property of Insolvent.*

79. A summons under Section 36 of the Act shall be in Form No. 15 or No. 16 as the case may be and shall be served in the following manner :—

- (a) If directed to the insolvent, or a creditor who has proved his debt, by post ;
- (b) If directed to any other person to give information respecting the insolvent, his dealings or property, or to produce any document, in manner prescribed by the Rules of the High Court for service of a summons to a witness ;
- (c) If directed to any person suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to him, in manner prescribed by the said rules for service of a summons to a defendant in suit.

80. The costs of any application or proceeding under Section 36 shall be in the discretion of the Court, and the Court may direct that the costs of the applicant or of any party shall be paid by the Official Assignee in priority to other claims against the estate of the insolvent, or shall be added to the claim of any creditor.

81. A warrant to seize the property of an insolvent shall be in Form No. 17 and shall be granted to the Sheriff.

ORDER X.*Proof of Debts.*

82. The proof shall be by affidavit in Form No. 18 with such variations as circumstances may require.

83. Notice of an application by a creditor or insolvent with respect to a proof admitted or rejected by the Official Assignee shall be given to the Official Assignee, and to the creditor who made the proof, if he is not the applicant, not less than 5 days before the day appointed for the hearing.

84. The Official Assignee shall, upon receiving notice from a creditor of the insolvent of his intention to apply to the Court with respect to a proof file the proof with the Registrar, with a memorandum of his decision thereon. After the hearing of the application, the proof, shall be returned to the Official Assignee with an endorsement thereon of the decision on the Court.

85. The Official Assignee shall not be personally liable for costs in relation to any application with respect to such decision as aforesaid.

ORDER XI.*Dividends.*

86. Notice of intention to declare a dividend shall be in Form No. 19 and shall be published by the Official Assignee in the *Fort St. George Gazette* and shall be sent by him to each creditor who has not proved his debt and to the Registrar.

(a) On the requisition of any creditor, the Official Assignee shall send to him a statement, as to the particulars of the estate in Form No. 20.

87. Such notice shall specify the latest date up to which proof must be lodged, which shall not be less than 14 days from the date of the notice.

(a) On receipt of such notice, the Registrar shall cause the petition to be posted for declaration of dividend not less than one month after the date specified in the notice.

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88. Before the day appointed for the declaration of dividend, the Official Assignee shall file in Court a proportion account in Form No. 21.

89. Notice of the declaration of a dividend shall be in Form No. 22 and shall be sent by the Official Assignee to each creditor who has proved his debt within one month after the declaration.

90. The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post.

91. Upon the declaration of a dividend, the Official Assignee shall forthwith transmit to the Registrar a list of proofs and a request for orders for payment of the dividend in Form No. 23. If the dividend is not declared within the period prescribed by Section 69 of the Act, the Official Assignee shall append to the said request a statement of the reason for postponing the declaration to a later date.

92. The said list and request shall be returned by the Registrar to the Official Assignee together with the order of the Court thereon.

93. Unless the Court otherwise orders, every bill of exchange, promissory note or other negotiable instrument, upon which proof has been made, shall be exhibited to the Official Assignee before payment of dividend thereon, and the amount of dividend paid shall be endorsed on the instrument.

94. Notice of intention to declare a final dividend shall be published by the Official Assignee in the *Fort St. George Gazette*, and shall be sent by post to each of the creditors entered in the schedule who have not proved their claims, not less than one month before the application to the Court for leave to declare the dividend. Such notice shall state the day appointed by the Registrar for the application to the Court.

95. The Official Assignee shall not less than 5 days before the day so appointed, file in Court a balance sheet setting out the amount realised by him, the amount expended by him in the administration of the estate, specifying the principal items of such realizations and expenditure, the amounts already distributed, and the amount of his commission thereon and in respect of the final dividend.

96. The Official Assignee shall certify to the Court the sums due to the creditors who have not applied for their dividends, and the Court may direct the Official Assignee to keep such dividends to the credit of his dividend account for a period not exceeding 3 months and after the expiration of such period to pay such sums to the Accountant-General and that such sums shall be invested by the Accountant-General in Government securities and carried to the credit of the unclaimed dividend account in his hands, or make such other order as it may think fit.

97. At any time before the expiration of the said period, the Official Assignee may pay the sum due to any creditor to him or to the Attorney or agent nominated by him, but after the expiration thereof, he shall pay the same only under an order of the Court made on the application of the creditor upon notice to the Official Assignee.

98. In the case of all dividends remaining unclaimed for 3 months from the date of declaring the same, the Official Assignee shall cause notice thereof to be given by posting in his Office and upon the Court notice-board a list containing the serial numbers of the petitions, the names of insolvents, and of the creditors to whom dividends are payable, and the amounts of such dividends.

ORDER XII.

Small Insolvencies.

99. Where an application is intended to be made or an order is passed for the summary administration of an insolvent's estate, the following rules shall apply:—

100. Unless the Court otherwise orders, it shall not be necessary to publish any notice relating to the insolvency in the *Gazette of India* or the *Fort St. George Gazette*, and in all cases where such publications is directed by the Act or these rules it shall be sufficient in lieu thereof to affix the notice to the notice-board of the Court.

101. The petition shall state that the property of the insolvent is not likely to exceed Rs. 3,000, and shall pray that the estate may be administered summarily.

102. The petition and all subsequent proceedings shall be endorsed "Summary Case" and shall be entered in a separate list of cases.

103. The Registrar shall send the insolvent's petition to the Official Assignee, who shall after noting the contents thereof, return the same to the Registrar.

104. The insolvent shall, within 10 days after filing his schedule attend the Official Assignee, and give him any information required by him as to the insolvent's affairs.

105. Notice to the creditors of the intention of the Official Assignee to declare a dividend and of the declaration of a dividend, may be given by affixing the same to the notice-board of the Court.

106. The affidavit of service required by Rule 66 (1) shall be filed in Court not more than two months after the date of filing of the schedule. In default, the Registrar shall post the petition for orders.

ORDER XIII.

Administration of Estate of a Deceased Debtor.

107. A petition under Section 108 of the Act shall be in Form No. 24 with such variations as the case may require, and shall be signed and verified by the petitioner. The Registrar shall appoint a day for the hearing of the petition, and shall sign the endorsement in the said form.

108. Notice of the petition shall be given to the legal representative of the deceased, by serving him with a sealed and certified copy of the petition in manner prescribed for service of creditor's petition not less than 5 days before the day so appointed. Provided that in any case where there are numerous representatives of the deceased, the Court may direct that service of a copy of the petition may be made on one or more of the representatives, and that notice of the petition may be sent by post to the other representatives, or may give such other directions as the Court may deem fit.

109. Where an administration order under Section 108 of the Act is made, it shall be the duty of the legal representative of the deceased debtor to lodge with the Official Assignee forthwith an account of the dealings with and administration of the deceased's estate by such representative, and he shall also furnish forthwith a list of the creditors and a statement of the assets and liabilities and such other particulars of the affairs of the deceased as may be required by the Official Assignee.

110. The costs and expenses incurred by the legal representative in preparing and lodging any account, list or statement under the last preceding rule shall be taxed and after taxation shall be allowed out of the estate, if any, upon production of the allocatur of the taxing officer.

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111. If it is made to appear to the Court that no legal representative exists, the Court may order that the account, list and statement mentioned in Rule 109 shall be made and lodged by such person as, in the opinion of the Court, may have taken upon him the administration of, or may otherwise have intermeddled with, the property of the deceased, or any part thereof.

112. In proceedings for the administration of the estate of a deceased debtor, the provisions of the Act and of these rules shall, so far as applicable, apply as if the proceedings were upon a creditor's petition.

113. If a surplus remains in the hands of the Official Assignee and there is no legal representative, or his title to give an effectual discharge is doubtful or in dispute, the Official Assignee shall pay the surplus to the Official Trustee.

ORDER XIV.*Official Assignee's Powers and Duties.*

114. The Official Assignee shall be entitled to disclaim any property held by the insolvent under a tenancy not exceeding one year, or for any term at a rack rent, without the leave of the Court.

115. The Court may on the application of the Official Assignee direct that the debtor's books of account and other documents given up by him may be sold, destroyed or otherwise disposed of.

116. Application by the Official Assignee to the Court may be made personally and without notice or other formality, but the Court may, in any case, order that an application shall be renewed formally under Rule 15; and that such notice thereof be given to any person likely to be affected thereby as the Court may direct.

117. Except where otherwise provided by the Act or these rules, evidence to be given by the Official Assignee may be given by his report to the Court and need not be upon affidavit: and such report shall be *prima facie* evidence of the matter reported upon.

118. The Official Assignee shall be at liberty to inspect the records of the Court, and to take notes or copies of the proceedings, in any petition in insolvency.

119. If the Official Assignee be appointed interim receiver under Section 16 of the Act, he shall, with respect to any immovable and movable property and credits of, and any business carried on by, the insolvent, have all the powers of a receiver and manager appointed by the High Court.

120. The office of the Official Assignee shall be open from 12 noon to 2 p.m. on all days except Sundays and holidays.

ORDER XV.*Practitioners of the Court.*

121. Every appointment of an attorney to make or do any appearance, application, or act, shall be in writing, and shall bear the date of execution, and shall be endorsed with the address for service of the attorney, and the said endorsement shall be signed by him.

122. No attorney shall be allowed to appear or act in any petition, proceeding, appeal, or matter, until he has filed in Court an appointment in accordance with these rules. If the appointment is executed by an agent of the party, the attorney shall, if required, produce the power of attorney, authorizing the agent to appoint him, and, if required, shall also file in Court a copy thereof with the appointment.

123. An appointment on behalf of a firm may be signed by any partner authorized thereto in the name of the firm.

124. The appointment of an attorney shall, unless otherwise provided therein, or unless the appointment ceases by reason of the death of the client, or the attorney, or is revoked under rule 125 continue in force, in the petition or matter in all proceedings in the High Court, whether in execution of, or on appeal from, or otherwise in connection with, any decree or order which may be passed in the said petition or matter, or in any appeal or other proceedings in connection therewith.

125. The appointment of an attorney may be revoked by an order to be obtained upon summons in chambers. Unless the consent of the client or attorney (as the case may be) is endorsed thereon, notice of the application shall be given to him.

126. After the determination of his appointment, an attorney shall not unless he has given the party by whom he was previously employed an opportunity of engaging his services, appear or act in the same petition, appeal, or matter, or in any proceedings connected therewith, for any person whose interest is opposed to that of his former client.

127. A party, who has filed an appointment of an attorney, shall not be allowed to appear before the Court, except in the absence of his attorney, or to make any application or do any act, in person, so long as the appointment is in force.

128. An advocate may appear and plead upon any hearing in Court or in Chambers, provided that the taxing officer shall not, as between party and party, allow any fee in respect of his attendance at Chambers, unless the Judge certifies that the case is a proper one for the attendance of an advocate.

129. An attorney may appear, plead and act upon all proceedings; provided that he shall not be allowed to appear or plead upon a hearing in Court.

130. The attorney shall be responsible to the Registrar for all court-fees payable in the petition, appeal, or matter, in which he is appointed. If any fee is not paid within seven days from the same becoming due, the Registrar shall stop the issue of all papers, from his office to the attorney responsible therefor; provided that in case of urgency or for other sufficient cause, the Registrar may direct a particular paper to be issued to the attorney.

131. The retainer of a prisoner shall be accepted by the attorney personally, or by another attorney on his behalf.

ORDER XVI.

Costs—Fees—Taxation of Costs.

132. If the petition of a debtor is dismissed, the Court may direct the costs of the Official Assignee and of an opposing creditor or other party to be paid by the debtor or to be retained or paid by the Official Assignee out of the assets if any in his hands, and that the said assets be not delivered to the debtor until the said costs are paid or satisfied. If the petition of a creditor is dismissed, the Court may direct the costs of the Official Assignee and of the debtor or other party to be paid by the creditor; or that the costs of the Official Assignee be retained by him out of the assets if any in his hands, and that the amount thereof and the costs of the debtor be paid by the creditor to the debtor.

133. The Court shall have power to direct the costs of any petition, application or matter to be paid by any party to the proceedings, whether he is or is not the successful party therein, or to be paid out of any fund in or under the control of the Court, or in the

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Madras hands of the Official Assignee or other officer of the Court, and generally to deal with the costs of all proceedings in the Court as to it may seem just.

134. The fees set out in Appendix III hereto, shall be charged and received by the Registrar, the Sheriff of Madras, and the Official Assignee, respectively, upon the several proceedings, documents, and matters in the said Appendix specified as chargeable.

135. The costs and expenses of serving or publishing any notice shall be paid by the Official Assignee out of the assets of the estate in respect of which such service or publication was made.

136. One half of the several fees set out in the column headed " Lower scale " of Appendix IV to the High Court Fees Rules, 1902, shall be allowed to the attorneys of the Court for the business done by them. Provided as follows :—

- (1) The fee for copies and engrossments shall be at the rate of four annas per folio ;
- (2) the fee for the preparation of the affidavit of service of notice to creditors, including copy for filing, and all attendances on the party of the Officer or the Court, shall be four annas per folio ;
- (3) the Court may, under Rule 40 of the said rules, order that the full fees set out in the said column shall be allowed.

137. Subject to the foregoing rules, and so far as the same are applicable, the High Court Fees Rules, 1902, except Rules 4, 6 and 63, and Appendix II, shall regulate the fees to be charged and received by the Officers and attorneys of the Court, and levy and taxation thereof.

ORDER XVII.*Accounts of the Official Assignee and of the Accountant of the Court.*

138. The Official Assignee shall maintain the books of account mentioned in part I of Appendix IV of which the first column contains the names of the several books, and the second column specifies the entries to be made therein respectively.

139. The Official Assignee shall keep three accounts at the Bank of Madras, namely, the " Collection Account," the " Office Charges Account," and the " Dividend Account."

140. The Registrar of the High Court shall maintain the books of account mentioned in part II of Appendix IV, of which the first column contains the names of the several books, and the second column specifies the entries to be made therein respectively.

141. The Official Assignee shall be entitled to retain in his hands for petty expenses a sum not exceeding Rs. 2,000, and subject thereto, all moneys received and paid by him shall be paid into or out of the Bank of Madras.

142. The Official Assignee shall from time to time certify and pay to the Registrar of the High Court the amount standing to the credit of the Collection Account which may in his opinion be invested, and the Registrar of the High Court shall thereupon purchase Government securities for that amount, and the same shall be placed to the credit of the Collection Account of securities in the hands of the Registrar of the High Court. The interest from time to time accruing on the said investments shall be carried to the credit of the Office Charges Fund.

143. The Official Assignee may from time to time certify to the Registrar of the High Court the amount of securities standing to the credit of the Collection Account, or Estates Account, of securities, which he desires shall be sold, and the Registrar of the High Court shall thereupon sell the same and pay the net sale proceeds to the Collection Account of the Official Assignee at the Bank of Madras.

144. The Registrar of the High Court shall invest any moneys paid to him by the Official Assignee under Rule 96 in Government securities and shall carry the said investments to the credit of the Unclaimed Dividend Account of securities in his hands.

145. The interest from time to time accruing on the said investments shall be carried to the credit of the Office Charges Fund.

146. The Registrar of the High Court shall from time to time debit the Office Charges Fund with, and pay to the credit of the Office Charges Account of the Official Assignee at the Bank of Madras, such sums as shall be necessary to meet the drawings by the Official Assignee on the said account, and shall invest such part of any balance of the said Fund as he may from time to time think fit in Government securities, and shall carry the said investments to the credit of General Profit Account of securities in his hands.

147. The interest from time to time accruing on the said investments shall be carried to the credit of the Office Charges Fund.

148. The accounts of the Official Assignee shall be audited once in every year by the Examiner of the Local Fund Accounts or an auditor appointed by him, and the costs of the audit, as allowed by the Court, shall be paid by the Official Assignee and debited to Office Charges Account.

149. The day-book of the Official Assignee shall also be subject to a concurrent monthly audit by the Examiner of the Local Fund Accounts.

150. The Official Assignee shall, before the 1st day of July in every year, forward to the Examiner of the Local Fund Accounts a statement certified by him containing a list of all estates (1) committed to his charge during the previous year ending the 31st day of December, (2) committed to his charge prior to the said period, on account of which he has, during the said period, received any moneys or securities, (3) wherein dividends have been declared or distributed during the said period, *and an account of all sales with full details as to the expenses, costs and commission paid to auctioneers on each sale.*

151. Upon the receipt of the said statement *and account*, the said auditor shall proceed to audit the accounts of the Official Assignee, and shall, before the 1st day of September following, forward his report thereon to the Registrar of the High Court.

Security Allowances and Expenses of the Official Assignee.

152. The Official Assignee shall execute a bond for Rs. 10,000 with two sureties in favour of the Chief Justice of the High Court for the time being, as security for the due performance of his duties.

153. Where under Section 74 of the Act, the Court directs the Official Assignee to pay interest, the rate of interest shall not exceed 12 per cent. per annum.

154. The Official Assignee shall be at liberty to draw every month from the moneys standing to the credit of the Office Charges Fund for his personal remuneration, and for the costs, and charges, and remuneration of his establishment such sum as may from time to time be sanctioned by the Court.

155. The Court may, by special order, from time to time authorize the Official Assignee to draw from the moneys standing to the credit of the office charges fund any further sums which in the opinion of the Court are necessary to meet any special expenses in connection with the costs, charges and remuneration of his establishment.

156. In addition to the said allowances, the Official Assignee shall be entitled to a commission of five per cent. upon the moneys from time to time to be distributed as dividends out of the estate of any insolvent in his hands.

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Madras 157. The said commission shall be calculated upon the total amount to be so distributed, and shall be entered as a payment in the accounts of the insolvent's estate maintained by the Official Assignee.

158. The said amount chargeable with commission shall include any net balance remaining in the hands of the Official Assignee upon the dismissal of a petition, or the annulment of an order of adjudication, and any moneys repaid to the insolvent. •

159. Where an insolvent has no available assets, the Official Assignee shall not be required to incur any costs, charges or expenses in relation to his estate without the express direction of the Court. Provided that he shall be at liberty to apply any moneys, not exceeding Rs. 100 in any one matter, standing to the credit of the Office Charges Fund in defraying any necessary court-fees, costs, charges and expenses therein.

160. Upon the application of the Official Assignee, the Court may from time to time empower him to apply any moneys standing to the credit of the said fund, to an amount specified in the order of the Court in payment of any costs, charges and expenses of or in connection with the realisation or administration of the estate of an insolvent, or of any suit, appeal, prosecution, or other proceedings authorized by the Court.

161. All sums advanced out of the said fund under this rule shall be repaid out of any assets of the insolvent in priority to all other claims or charges.

ORDER XVIII.*Registrar.*

162. The Registrar shall have the following powers and duties :—

- (1) to transmit any notice, order, or other process, for service or execution by any Court or authority ;
- (2) to determine the proper sum to be tendered to a witness ;
- (3) to have the custody of the records of the Court ;
- (4) to certify copies of the records of the Court ;
- (5) to sign all writs, notices, decrees, orders, warrants and other judicial process ;

Provided that the Registrar shall, when so required by any party interested, refer any matter to the Court.

163. The manager of the Insolvency Office, or other person from time to time appointed by the Registrar, shall be his deputy for the purposes of sub-rules (1), (2), (4) and (5) of the preceding rule.

**BOMBAY RULES MADE UNDER S. 112 OF THE PRESIDENCY-TOWNS
INSOLVENCY ACT, III OF 1909.**

Preliminary.

Rules—P-t. I. A.

Bombay.

1. These Rules may be cited as "The Bombay Insolvency Rules 1910." They shall come into operation on the 1st day of January 1910, and shall also, as far as practicable, and unless otherwise expressly provided, apply to all matters arising and to all proceedings taken in any matters under the Act, on or after that day.

Interpretation of terms. 2. In these Rules unless the context or subject-matter otherwise requires:

- (1) 'The Act' means the Presidency-towns Insolvency Act, 1909.
- (2) 'The Court' includes an officer of the Court when exercising the powers of the Court pursuant to the Act of these Rules.
- (3) 'Creditor' includes a corporation or firm of creditors in partnership.
- (4) 'Debtor' includes a firm of debtors in partnership and includes any debtor proceeded against under the Act, whether adjudged Insolvent or not.
- (5) 'Chief Clerk' means the principal ministerial officer of the Court.
- (6) 'The Judge' means the Judge to whom insolvency business is for the time being assigned under Section 4 of the Act.

Use of forms in Appendix I. 3. The forms in Appendix I hereto, shall be used with such variations as circumstances may require.

Court and Chambers.

Matters to be heard in Court. 4. The following matters and applications shall be heard and determined in open Court, namely:—

- (a) Applications for protection orders.
- (b) The public examination of insolvents.
- (c) Applications to approve a composition or scheme of arrangement.
- (d) Applications for orders of discharge.
- (e) Applications to set aside or avoid any settlement, transfer, security or payment or to declare for or against the title of the Official Assignee to any property adversely claimed.
- (f) Applications for the committal of any person to prison for contempt.
- (g) Appeals against the rejection of a proof or application to expunge or reduce a proof where the amount in dispute exceeds Rs. 2,000.

Any other matter or application may be heard and determined in chambers.

Adjournment from officer to Judge. 5. Any matter which an officer of the Court empowered under Section 6 of the Act has jurisdiction to determine shall be adjourned to be heard before the Judge:—

- (a) If all the parties require it.
- (b) If any party or applicant on an *ex parte* application requires it, and the officer thinks that it involves a question of difficulty on the ground of novelty or otherwise.
- (c) If the Judge shall either specially or by any particular direction applicable to the particular case, so direct.

Rules—P.-t. I. A.**Bombay**

6. Subject to the provisions of this Act and these Rules any matter or application may at any time, if the Judge (or as the case may be the officer empowered under section 6) thinks fit, be adjourned from Chambers to Court or from Court to Chambers; and if all the contending parties require any matter or application to be adjourned from Chambers into Court, it shall be so adjourned.

Proceedings.

7. (1) Every proceeding in Court under this Act shall be dated and shall be intitled "In Insolvency" with the name of the matter to which it relates.

(2) All applications and orders shall be intitled *ex parte* the applicant.

(3) A petition instituting proceedings in a matter shall on presentation to the Court, be assigned a distinctive number by the Chief Clerk, and all subsequent proceedings in the same matter shall bear the same number.

(4) Form No. 1 in Appendix I shall be used with such variations or additions as circumstances may require.

8. All petitions, schedules, affidavits, applications and other proceedings presented to the Court shall be written type-written or printed, fairly and legibly on durable foolscap paper or other paper similar to it in size and quality bookwise and with an inner margin of about an inch and a quarter wide. The writing or printing shall be on both sides of the paper, and numbers shall be expressed in figures.

9. All proceedings of the Court shall remain on record in the Court, so as to form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the Officers of the Court, or by special direction of the Judge or Chief Clerk; but they may at all reasonable times be inspected by the Official Assignee, the debtor and any creditor who has proved, or any person on behalf of the Official Assignee, debtor or any such creditor.

10. All notices required by the Act or these Rules shall be in writing, unless these Rules otherwise provide, or the Court shall in any particular case otherwise order.

11. All summonses, petitions, notices, orders, warrants, and other process issued by the Court shall be sealed.

12. Where the Court orders a general meeting of creditors to be summoned it shall be summoned as the Court directs, and in default of any direction by the Court, the Chief Clerk shall transmit a sealed copy of the order to the Official Assignee, and the Official Assignee shall not less than seven days before such meeting send a copy of the order to each creditor at the address given in his proof, or when he shall not have proved, the address given in the list of creditors by the insolvent or such other address as may be known to him.

13. All office copies of petitions, proceedings, affidavits, books, papers and writings or any part thereof required by the Official Assignee or by any insolvent or by any creditor or by the solicitor of any such Official Assignee, insolvent or creditor shall be provided by the Chief Clerk and shall, except as to figures, be fairly written at length and be sealed and delivered out without any unnecessary delay and in the order in which they shall have been bespoken.

14. Where in the exercise of his functions under the Act the Official Assignee requires to inspect or use the file of proceedings in any matter, the Chief Clerk shall (unless the file is at the time required for use in Court or by him) on request transmit the file of proceedings to the Official Assignee.

Use of file by Official Assignee.

15. (1) The Chief Clerk shall file a copy of each issue of the *Gazette of India* and the local *Official Gazette* and whenever the *Gazette* contains any advertisement relating to any matter under the Act, the Chief Clerk shall file with the proceedings in the matter a memorandum which shall be in the Form No. 109, in Appendix I, referring to and giving the date of such advertisement.

Filing, gasetting, &c.

- (2) In the case of an advertisement in a local paper the Chief Clerk shall, in like manner, file a memorandum referring to and giving the date of such advertisement.
- (3) For this purpose one copy of each local paper in which any advertisement relating to any matter under the Act in such Court is inserted, shall be left with the Chief Clerk by the person inserting the advertisement.
- (4) The memorandum by the Chief Clerk shall be *prima facie* evidence that the advertisement to which it refers was duly inserted in the issue of the "Gazette" or paper mentioned in it.

Motion and Practice.

16. Every application to the Court (unless otherwise provided by these Rules or the Court shall in any particular case otherwise direct) shall be made by motion supported by affidavit.

Application to be by motion.

17. When any party other than the applicant is affected by the motion, no order shall be made unless upon the consent of such party duly shown to the Court, or upon proof that notice of the intended motion and a copy of the affidavit in support thereof have been duly served upon such party provided that the Court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail serious mischief, may make any order *ex parte* upon such terms as to costs and otherwise, and subject to such undertaking, if any, as the Court may think just, and any party affected by such order may move to set it aside.

Notice of motion and *ex parte* applications

18. Unless the Court gives leave to the contrary, notice of motion shall be served on any party to be affected thereby not less than four days before the day named in the notice for hearing the motion. An application for leave to serve short notice of motion shall be made *ex parte* and the fact that short notice has been allowed shall be stated in the notice of motion.

Length of notice.

19. Where a respondent intends to use affidavits in opposition to a motion he shall deliver copies of such affidavits to the applicant not less than two days before the day appointed for the hearing.

Affidavits against motion.

20. If on the hearing of any motion or application the Court shall be of opinion that any person to whom notice has not been given, ought to have, or to have had, such notice, the Court may either dismiss the motion or application or adjourn the hearing thereof, in order that such notice may be given upon such terms as the Court shall think fit.

Notice not served on all proper parties.

Rules—P.-t. I. A.**Bombay**

21. Every affidavit to be used in supporting or opposing any opposed motion shall be filed with the Chief Clerk not later than the day before the day appointed for the hearing.

Filing affidavits on motion.

22. A party intending to move shall, not later than four o'clock on the day previous to the day appointed for the hearing, deliver to the Chief Clerk a copy of his notice of motion. There shall be indorsed on such copy the name of the applicant's attorney (if any). Every notice of motion shall be entered by the Chief Clerk in a list for hearing on the day appointed in such notice.

Notice of motion to be filed.

23. If within one week from the making of an order of adjudication, order annulling adjudication, order an application to approve a composition or scheme, order annulling a composition or scheme or order on application for discharge, such order has not been completed, it shall be the duty of the Chief Clerk to prepare and complete such order; provided that if in any case the Judge shall be of opinion that the provisions of this Rule ought not to apply, he may so order; and provided also that where an order of discharge is granted subject to the condition that judgment shall be entered against the Insolvent, nothing in this Rule shall require the Chief Clerk to prepare and complete the order until the Insolvent has given consent, in the prescribed form, to judgment being entered against him.

Preparation of orders.

24. A person who has the carriage of an order shall obtain from the Chief Clerk an appointment to settle the order, and shall give reasonable notice of the appointment to all persons, who may be affected by the order, or to their attorneys.

Notice of appointment to settle order.

Security in Court.

25. Except when these Rules otherwise provide where a person is required to give security, such security shall be in the form of a bond with one or more surety or sureties to the person proposed to be secured.

Security by bond.

26. The bond shall be taken in a penal sum, which shall not be less than the sum for which security is to be given and probable costs, unless the opposite party consents to it being taken for a less sum.

Amount of bond.

27. Where a person is required to give security he may, in lieu thereof, lodge in Court a sum equal to the sum in question in respect of which security is to be given and the probable costs of the trial of the question together with a memorandum to be approved of by the Chief Clerk and to be signed by such person, his solicitor, or agent setting forth the conditions on which the money is deposited.

Deposit in lieu of bond.

28. In all cases where a person proposes to give a bond by way of security, he shall serve by post or otherwise, on the opposite party and on the Chief Clerk, notice of the proposed sureties which shall be in the Form No. 11 in Appendix I. The Chief Clerk shall forthwith give notice to both parties of the time and place at which he proposes that the bond shall be executed, and shall state in the notice that should the proposed obligee have any valid objection to make to the sureties or either of them, it must be made at that time.

Notice of sureties.

29. The sureties shall make an affidavit of their sufficiency (which shall be in the Form No. 12 in Appendix I) unless the opposite party shall dispense with such affidavit and such sureties shall attend the Court to be cross-examined if required.

Justification by sureties.

Execution of bond.

30. The bond shall be executed and attested in the presence of the Chief Clerk or of the Official Assignee.

Bombay

31. Where a person makes a deposit of money in lieu of giving a bond, the Chief Clerk shall forthwith give notice to the person to whom the security is to be given of such deposit having been made.

Notice of deposits.

Affidavits.

32. The Rules of the High Court of Bombay, 1909 relating to affidavits shall apply to affidavits used in insolvency matters, with such variations as the nature of the case may require.

Affidavits.

Discovery of Insolvent's Property.

33. Every application to the Court under Section 36 of the Act shall be in writing, and shall state shortly the grounds upon which the application is made. Where the application is made on behalf of the Official Assignee it need not be verified by affidavit.

Application for discovery.

33A. A Summons under Section 36 of the Act shall be in the Form No. 93 in Appendix I hereto, with such variations as circumstances may require.

Form of Summons.

Appropriation of Pay or Salary or Income.

34. Where the Official Assignee or a creditor intends to apply to the Court for an appropriation order under Section 60 of the Act, he shall give notice to the insolvent of his intention to do so. Such notice shall specify the time and place fixed for hearing the application and shall state that the insolvent is at liberty to show cause against such order being made. The notice shall be in the Form No. 85 in Appendix I hereto, with such variations as circumstances may require.

Notice to insolvent of application.

35. Where an order is made under Section 60 of the Act the Chief Clerk shall give to the Official Assignee a scaled copy of the order, who shall communicate the same to the chief of the department or other person under whom the pay or salary or income is enjoyed.

Copy of order to department.

36. Where an order has been made for the payment by an insolvent or by his employer for the time being, of a portion of his salary or income, the insolvent may, upon ceasing to receive a salary or income of the amount he received when the order was made, apply to the Court to rescind the order or to reduce the amount ordered to be paid by him to the Official Assignee.

Review of order.

Warrants, Arrests and Commitments.

37. A warrant of seizure, or a search warrant, or any other warrant issued under the provisions of the Act shall, if granted to an officer of the Court, be addressed to the Sheriff or such other officer of the Court as the Court may in each case direct.

To whom warrants addressed.

38. Where an insolvent is arrested under a warrant issued under Section 36 of the Act he shall be given into the custody of the jailor or keepers of the prison mentioned in the warrant, who shall produce such insolvent before the Court as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order; and any books, papers, moneys and goods in the possession of the insolvent which may be seized shall forthwith be lodged with the Official Assignee.

Custody and production of insolvent.

Rules—P-t. I. A.**Bombay**Applications to
commit.

39. An application to the Court to commit any person for contempt of Court shall be supported by affidavit and shall be filed with the Chief Clerk.

40. Subject to the provisions of the Act and of the Rules, upon an application to commit, the Court shall fix a time and place for the Court to hear the application, notice whereof shall be personally served on the person sought to be committed, not less than three days before the day fixed for the hearing of the application. Provided that in any case in which the Court may think fit, the Court may allow substituted service of the notice by advertisement or otherwise, or shorten the length of notice to be given.

Notice and hearing
of application.

41. Where an order of committal is made against an insolvent for disobeying any order of the Court, or of the Official Assignee to do some particular act or thing, the Court may direct that the order of committal shall not be issued, provided that the insolvent complies with the previous order within a specified time.

Suspension of issue
of committal order.

42. (1) If an insolvent or witness examined before the officer empowered under Section 6 of the Act refuses to answer to the satisfaction of such officer any question which he may allow to be put, such officer shall report such refusal in a summary way to the Judge, and upon such report being made the insolvent or witness in default shall be in the same position and be dealt with in the same manner as if he had made default in answering before the Judge.

Committal of con-
tumacious insolvent or
witness.

(2) The report of such officer shall be in writing, but without affidavit, and shall set forth the question put and the answer (if any) given by the insolvent or witness.

(3) Such officer shall before the conclusion of the examination at which the default in answering is made, name the time and the place when the default will be reported to the Judge; and upon receiving the report, the Judge may take such action thereon as he shall think fit. If the Judge is sitting at the time when the default in answering is made, such default may be reported immediately.

(4) The report of such officer as aforesaid may be in the Form No. 15 in Appendix I hereto.

Service and Execution of Process.

43. Every attorney suing out or serving any petition, notice, summons, order, or other document, shall indorse thereon his name or firm and place of business in Bombay, which shall be called his address for service. All notices, orders, documents, and other written communications which do not require personal service shall be deemed to be sufficiently served on such Attorney if left for him at his address for service.

Address of
Attorney for service.

44. Service of notices, orders, or other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon of any week day, except Saturday, shall for the purpose of computing any period of time subsequent to such service be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall, for the like purpose, be deemed to have been effected on the following Monday.

Hours for service.

Rules—P-t. I. A.

Bombay

45. It shall be the duty of such Officer as the Court may direct, to serve such orders, summonses, petitions, and notices as the Court may require him to serve, to execute Warrants and other process, to attend any sittings of the Court (but not sittings in Chambers), and to do and perform all such things as may be required of him by the Court.

But this Rule shall not be construed to require any order, summons, petition, or notice to be served by an Officer of the Court which is not specially by the Act or these Rules required to be so served, unless the Court shall in any particular proceeding by order specially so direct.

Service by Post. 46. Where notice of an order or other proceedings in Court may be served by Post it shall be sent by registered letter.

Enforcement of orders. 47. Every order of the Court may be enforced as if it were a decree of the Court to the same effect.

Rules relating to the Business of the Court.

48. The Court shall sit for the despatch of business upon the first and third Tuesday in every month or upon such other days as may be necessary and may from time to time be fixed by the Chief Justice. When the first or third Tuesday in any month is a Court holiday the Court will sit upon the next working day of the same week.

Office hours. 49. The Office of the Chief Clerk in Insolvency (except in vacation and on Saturdays and holidays) shall be kept open daily from 10-45 A.M. till 5-30 P.M. but no work, unless of an urgent nature, will be admitted after 4-15 P.M. On Saturdays the Office shall be kept open from 10-45 A.M. to 1-45 P.M. but no work will be admitted after 1-15 P.M.

In vacation the office shall be kept open daily from 11-15 A.M. to 3-45 P.M. except on Saturdays and holidays, but no work, unless of an urgent character, will be received after 1-15 P.M.

Costs—Fees—Taxation of Costs.

50. (1) All bills of costs shall be taxed by the Taxing Officer of the High Court on its Original Side, and the Bombay High Court Rules relating to the taxation of costs shall apply to the taxation of such bills as far as circumstances will permit: *Provided that the Official Assignee may in his discretion tax any bill of costs not exceeding Rs. 300.*

(2) Where an estate is ordered to be administered in a summary manner under Section 106 of the Act, a lower scale of Attorneys' costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added.

51. The fees and percentages set out in Appendix II hereto, shall be charged and received by the Chief Clerk, Sheriff and Official Assignee respectively upon the several proceedings, documents and matters in the said Appendix specified as chargeable.

52. The assets in every matter remaining after payment of the actual expenses incurred in realizing any of the assets of the insolvent shall, subject to any order of the Court, be liable to the following payments which shall be made in the following order of priority

Priority of costs and charges payable out of the estate.

Rules—Part. I. A.**Bombay**

First.—The actual expenses incurred by the Official Assignee in protecting the property and assets of the insolvent or any part thereof, and any expenses incurred by him or by his authority in carrying on the business of the insolvent.

Next.—Any fees payable to or costs, charges or expenses incurred or authorized by the Official Assignee.

Next.—The balances of any deposits lodged with the Official Assignee under these Rules.

Next.—The remuneration of the special manager (if any).

Next.—The remuneration of the Official Assignee.

Next.—Any allowances made to the insolvent pursuant to an order of the Court.

Next.—Any costs directed by the Court to be paid out of the estate.

Next.—Any sums deposited under Rules 55 and 72.

Insolvency Petition.

53. Every petition shall be fairly written or printed or partly written and partly printed and no alteration, interlineations or erasures shall be made without the leave of the Chief Clerk, except so far as may be necessary to adapt a printed form to the circumstances of the particular case. A debtor's petition shall be in Form No. 2 and a creditor's petition shall be in Form No. 3 in Appendix I, hereto, with such variations as circumstances may require. A debtor's petition shall also state whether any previous petition has been presented to the Court either by or against him, with particulars of any such petition and the manner in which it was disposed of.

54. Every insolvency petition shall be attested. If it be attested in British India, the witness must be an Attorney, Vakil, Pleader, or Justice of the Peace or the Official Assignee or the Chief Clerk or the Head Clerk of the Official Assignee or Chief Clerk. If it be attested out of British India, the witness must be a Judge or Magistrate or a British Consul or Vice-Consul or a Notary Public.

55. (1) Upon the presentation of a petition either by the debtor or by a creditor, the petitioner shall deposit with the Chief Clerk the sum of Rs. 20 and such further sum as the Chief Clerk may, from time to time, require to cover the fees and expenses to be incurred by the Chief Clerk.

(2) The Chief Clerk shall account for the money so deposited to the creditor, or, as the case may be, to the debtor's estate, and any sum so paid by a petitioning creditor shall be repaid to such creditor, so far as circumstances will permit, out of the proceeds of the estate in the priority prescribed by these Rules.

Creditor's Petition.

56. A petitioning creditor who is a resident abroad, or whose estate is vested in a trustee under any law relating to insolvency, or against whom a petition is pending under the Act, or who has made default of payment of any costs ordered by any Court to be paid by him to the debtor, may be ordered to give security for costs to the debtor.

Verification.

57. Every creditor's petition shall be verified by affidavit.

58. Where the petitioning creditor cannot himself verify all the statements contained in the petition, he shall file in support of the petition the affidavit of some person who can depose to them.

Who to verify.

59. Where a petition is presented by two or more creditors jointly, it shall not be necessary that each creditor shall depose to the truth of all the statements, which are within his own knowledge, but it shall be sufficient that each statement in the petition is deposed to by someone within whose knowledge it is.

Joint petitioners.

Hearing of Petition.

Proceedings on petition if service required.

60. If service of a creditor's petition shall be ordered by the Court, the following provisions shall apply:—

- (a) The petition shall not be heard until the expiration of eight days from the service thereof, unless the Court otherwise directs.
- (b) The Chief Clerk shall appoint the time and place at which the petition shall be heard and notice thereof shall be written on the petition and sealed copies; and where the petition has not been served, the Chief Clerk may, from time to time, alter the first day so appointed and appoint another day and hour.
- (c) Where there are more respondents than one to a petition the provisions as to service shall be observed with respect to each respondent, but where all the respondents have not been served, the petition may be heard separately or collectively as to the respondents or such of the respondents as has or have been served, and separately or collectively as to the respondents not then served, according as service upon them is effected.
- (d) Where a debtor intends to shew cause against a petition he shall file his affidavits with the Chief Clerk and send copies thereof to the petitioner three days before the day on which the petition is to be heard.

61. Where the Court directs that a creditor's petition shall be served upon a debtor, such service shall be effected by an Officer of the Court or by the Creditor or his Attorney, or by some person in their employ, by delivering to the debtor a sealed copy of the filed petition; provided that if personal service cannot be effected, the Court may extend the time for hearing the petition, or if the Court is satisfied by affidavit or other evidence that the debtor is keeping out of the way to avoid such service, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business, or by registered letter or in such other manner as the Court may direct, and that such petition shall then be deemed to have been duly served on the debtor.

Service of petition.

62. Where the Court orders service of the petition on the debtor such service shall be proved by affidavit, with a sealed copy of the petition attached, which shall be filed in Court forthwith after the service.

Proof of service.

63. Where the Court orders service of a petition on a debtor petitioned against who is not within the limits of the Original Civil Jurisdiction of the Court, the Court may order service to be made within such time and in such manner and form as it shall think fit.

Service out of jurisdiction.

64. If a debtor upon whom the Court has ordered service of an insolvency petition dies before service thereof, the Court may order service to be effected on the legal representatives of the debtor, or on such other persons as the Court may think fit.

Death of debtor before service of petition.

Rules—P.-t. I. A.**Bombay**

66. If any creditor neglects to appear on his petition, no subsequent petition against the same debtor or debtors, or any of them, either alone or jointly with any other person shall be presented by the same creditor in respect of the same act of insolvency without the leave of the Court.

Non-appearance of creditor.

66. The personal attendance of the petitioning creditor and of the witnesses to prove the debt and act of insolvency or other material statements, upon the hearing of the petition may, if the Court shall think fit, be dispensed with.

Personal attendance of creditor when dispensed with.

67. Where proceedings on a petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt and such question has been decided in favour of the validity of the debt, the petitioning creditor may apply to the Chief Clerk to fix a day on which further proceedings on the petition may be heard, and the Chief Clerk, on production of a certified copy of the judgment of the Court in which the question was tried, shall give notice to the petitioner by post of the time and place fixed for the hearing of the petition, and a like notice to the debtor at the address given in his notice to dispute.

Proceedings after trial of disputed question.

68. Where proceedings on a petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and such question has been decided against the validity of the debt, the debtor may apply to the Chief Clerk to fix a day on which he may apply to the Court for the dismissal of the petition with costs and the Chief Clerk, on the production of a certified copy of the judgment of the Court in which the question was tried, shall give notice to both the petitioner and the debtor by post of the time and place fixed for the hearing of the application.

Application to dismiss.

69. An application for extension of time for the adjourned hearing of a petition shall be in writing, but need not be supported by affidavit unless in any case the Court shall otherwise require.

Application for extension of time.

70. On an application for extension of time for the adjourned hearing of a petition, no order shall be made for an extension beyond fourteen days from the day fixed for the adjourned hearing of the petition, unless the Court is satisfied that such extension of time will not be prejudicial to the general body of creditors. Any costs occasioned by such application shall not be allowed out of the estate unless so ordered by the Court,

Order for extension of time.

Interim Receiver.

71. Where an order is made appointing the Official Assignee to be *Interim Receiver* of the property of the debtor, such order shall bear the number of the petition in respect of which it is made and shall state the locality of the property of which the Official Assignee is ordered to take possession.

Form and contents of order.

72. Before any order is issued, the person who has made the application therefor shall deposit with the Official Assignee the sum of Rs. 100 towards the commission of the Official Assignee and for the expenses which may be incurred by him.

Deposit.

Rules—P-t. I. A.

Bombay

73. If the sum of Rs. 100 shall prove to be insufficient, the person on whose application the order has been made shall, from time to time, deposit with the Official Assignee such additional sum as the Court may, on the application of the Official Assignee from time to time, direct; and such sum shall be deposited within 24 hours after the making of such order. If such additional sum shall not be so deposited the order appointing the *Interim Receiver* may be discharged by the Court.

74. If an order appointing an *Interim Receiver* is followed by an order of adjudication, the despoits made by the creditor on whose application such *Interim Receiver* was appointed shall be repaid to him (except and so far as such deposits may be required by reason of insufficiency of assets for the payment of the commission payable to and the expenses incurred by the *Interim Receiver*) out of the proceeds of the estate in order of priority prescribed by these Rules.

75. Where after an order has been made appointing an *interim receiver*, the petition is dismissed, the Court shall upon application to be made within 21 days from the date of the dismissal thereof, adjudicate with respect to any damages or claim thereto arising out of the appointment and shall make such order as the Court thinks fit, and such decision or order shall be final and conclusive between the parties, unless the order be appealed from.

76. The Court, if it appoints the Official Assignee *interim receiver* of an estate, shall confer upon him all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of documents as the debtor himself has or such of those powers as the Court may think fit.

Proceedings when the debtor is in prison.

77. When the debtor is in prison, these Rules shall be subject to the following modifications.

78. The debtor's petition and schedule (if any) shall be forwarded by the jailor or keeper of the prison to the Chief Clerk, together with a certificate of the cause and period of detention of the debtor.

79. Where a creditor applies for an order of adjudication against a debtor in prison, if the Court shall order service of the petition on the debtor, the Chief Clerk shall transmit a copy of the petition to the jailor for service on the debtor.

80. On the application of the Official Assignee or the debtor or a creditor or for the purpose of any proceedings in Court, the Chief Clerk may issue an order to the jailor to produce the debtor before the Official Assignee or the Court. If the proceedings are adjourned, the Chief Clerk shall endorse on the order a direction to the jailor to produce the debtor on the adjourned day. The application of the debtor shall be sent by the jailor to the Chief Clerk.

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Notices, etc., how served.

81. Service of all notices, petitions, and processes upon the debtor shall be made by delivering the same to the jailor whose receipt therefor shall be sufficient proof of service on the debtor.

Service of Proceedings.

82. Where a debtor against whom an order of adjudication has been made is not in British India, the Court may order service on the debtor of the order of adjudication, order to attend the public examination or any adjournment thereof or of any other order made against, or summons issued for the attendance of, the debtor, to be made within such time and in such manner and form as it shall think fit.

Service where debtor abroad.

Proceedings on filing of debtor's petition.

83. Every debtor who shall file his petition shall lodge forthwith in the office of the Official Assignee all books, papers, writings, accounts and vouchers relating to his estate with a list thereof signed by himself and also a statement of his movable and immovable estate; if the debtor shall be in jail such list and statement as aforesaid shall be forwarded by the jailor.

Insolvent to lodge all books, etc., with Official Assignee.

84. On the debtor complying with the provisions of rule 83, the Official Assignee shall issue a certificate certifying the same, and no order of adjudication shall be made on the petition unless such certificate be produced.

Certificate of Official Assignee.

84A. The Chief Clerk shall send notice of every order of adjudication made on a creditor's petition to such two English daily papers and two Vernacular daily papers as the Court may, from time to time direct or in default of such direction, as he may select.

Notice of order to be advertised.

85. (1) An order of adjudication shall be in the Form No. 26 in Appendix I hereto, with such variations as circumstances may require.

Form of order and contents.

(2) Where any adjudication order is made on a creditor's petition, there shall be stated in the adjudication order the nature and date, or dates of the act, or acts of insolvency upon which the order has been made. Every order shall contain at the foot thereof a notice requiring the debtor to attend on the Official Assignee forthwith on the service thereof at the place mentioned therein.

86. A copy of every adjudication order, and order for the appointment of the Official Assignee as *Interim* Receiver of the debtor's property, sealed with the seal of the Court, shall forthwith be sent by the Chief Clerk to the Official Assignee.

Transmission of copy to Official Assignee.

87. The Chief Clerk shall cause a copy of the order of adjudication sealed with the seal of the Court, to be served on the debtor.

Service of adjudication order.

88. There may be included in an adjudication order an order staying any suit or proceeding against the debtor or staying proceedings generally.

Stay of Proceedings.

Annulment of Adjudication.

88. An application to the Court to annul an order of adjudication shall not be heard except upon proof that notice of the intended application, and a copy of the affidavits in support thereof have been duly served upon the Official Assignee. Unless the Court gives leave to the contrary, notice of any such application shall be served on the Official Assignee not less than seven days before the day named in the notice for hearing the application. Pending the hearing of the application, the Court may make an *interim* order staying such of the proceedings as it thinks fit.

89A. (1) The Chief Clerk shall send notice of an order annulling an adjudication to such local paper (if any) as the Court may in each case direct.

(2) An order annulling an adjudication may be in the Form No. 28, in Appendix I hereto, with such variations as circumstances may require.

(3) When an adjudication is annulled, the Chief Clerk shall forthwith give notice thereof to the Official Assignee.

Protection Order.

90. Every debtor, intending to apply for a protection order, shall give four days' previous notice to the Official Assignee and also to each execution creditor unless the Court shall think fit to dispense with notice to any of such creditors. Every application for protection shall be made by petition setting forth the grounds on which the application is made.

Schedule.

91. Every insolvent shall be furnished by the Chief Clerk with forms and instructions for the preparation of his Schedule. The Schedule (which shall be made out in duplicate and one copy of which shall be verified) shall be in the Form No. 23 in Appendix I hereto with such variations or additions as circumstances may require. The insolvent shall file with the Chief Clerk the verified Schedule, and the duplicate Schedule with the Official Assignee.

92. Where an insolvent requires an extension of the time for the filing of his Schedule, he shall apply to the Official Assignee, who may, if he thinks fit, give a written certificate extending such time in form No. 111 in Appendix I hereto which certificate shall be filed with the Chief Clerk and shall render an application to the Court unnecessary.

93. An insolvent shall not be at liberty to amend his Schedule unless he shall produce to the Chief Clerk a certificate signed by the Official Assignee containing the proposed amendment in the Form No. 110, in Appendix I hereto.

94. The Official Assignee in causing a Schedule to be prepared under the provisions of sub-section (4) of Section 24 of the Act, shall follow as far as circumstances will permit Form No. 23 in Appendix I hereto.

Public examination of Insolvent.

95. Where an order of adjudication has been made against an insolvent, it shall be the duty of the Official Assignee to make an application to the Court to appoint a day and hour for holding the public examination of the insolvent, and upon such application being

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Bombay made, the Court shall by an order appoint the day and hour for such public examination and shall order the insolvent to attend the Court upon such day and at such hour.

96. Where any order is made appointing the time and place for holding the public examination of an insolvent, seven days before the day so appointed the Chief Clerk shall serve a copy of such order on the insolvent, and the Official Assignee shall give to the creditors notice of such order and of the time and place appointed thereby. The Official Assignee shall also send a notice of such order to such local paper, if any, as the Court may direct.

97. Where the Court is of opinion that an insolvent is failing to disclose his affairs or where an insolvent has failed to attend the public examination or any adjournment thereof, or where an insolvent has not complied with any order of the Court in relation to his accounts, conduct, dealings, and property and no good cause is shown by him for such failure, the Court may adjourn the public examination *sine die* and may make such further or other order as the Court shall think fit.

98. Where an examination has been adjourned *sine die*, and the insolvent desires to have a day appointed for proceeding with his public examination, the expenses of giving notice to creditors of the day to be appointed for proceeding with such examination, shall unless the Official Assignee consents to the costs being paid out of the estate, be at the cost of the insolvent, who shall, before any day is appointed for proceeding with the public examination, deposit with the Official Assignee such sum as the Official Assignee shall think sufficient to defray the expenses aforesaid. The balance of the deposit after defraying the expenses aforesaid shall be returned to the insolvent.

99. In any case in which a public examination has been adjourned *sine die* and the Court afterwards makes an order for proceeding with such examination, notice to creditors of the time and place appointed for proceeding with such examination shall be sent by the Official Assignee and notice shall also be inserted in the local paper, if any, in which the notice of the first holding of the public examination was directed to be inserted, seven days before the day appointed.

100. (1) An application for an order dispensing with the public examination of an insolvent or directing that the insolvent be examined in some manner or at some place other than usual, on the ground that the insolvent is a lunatic or suffers from mental or physical affliction, or disability rendering him unfit to attend a public examination, or is a woman who, according to the manners and customs of the country, ought not to be compelled to appear in public, may be made by the Official Assignee or by any person who has been appointed by any Court having jurisdiction so to do to manage the affairs of or represent the insolvent or by any relative or friend of the insolvent who may appear to the Court to be a proper person to make the application.

(2) Where the application is made by the Official Assignee, it may be made *ex parte* and the evidence in support of the application may be given by a report of the Official Assignee to the Court, the contents of which report shall be received, as *prima facie* evidence of the matters stated therein.

(3) Where the application is made by some person other than the Official Assignee, it shall be made by motion of which notice shall be given to the Official Assignee and shall, except in the case of a lunatic so found by inquisition, be supported by affidavit.

(4) Where the application is made by a person other than the Official Assignee, he shall, before any order is made on the application, deposit with the Official Assignee such sum as the Official Assignee shall certify to be necessary for the expenses of the examination.

(5) The order to be made on the application shall be in the Form No. 18 or the Form No. 19 in Appendix I hereto, as the case may be, with such variations as circumstances may require.

Composition or Scheme.

101. Where an insolvent intends to submit a proposal for a composition or a scheme, the *Forms of Proposal, Notice, and Report, Nos. 50, 51, 52, 53, 54, and 55*, in Appendix I hereto, with such variations as circumstances may require, shall be used by the Official Assignee for the purpose of the meeting of creditors for consideration of the proposal.

102. Where the creditors have accepted a composition or scheme subject to the provisions of Section 29, Sub-section (2), the Official Assignee or the insolvent may forthwith apply to the Court to fix a day for the hearing of an application for the approval of such composition or scheme. The Official Assignee shall not, by making such application, be deemed necessarily to approve of the composition or scheme.

102A. Any person other than the Official Assignee who applies to the Court to approve of a composition or scheme shall, not less than seven days before the day appointed for hearing the application, send notice of the application to the Official Assignee.

103. Whenever an application is made to the Court to approve of a composition or scheme, the Official Assignee shall, not less than three days before the day appointed for hearing the application, send notice of the application to every creditor who has proved.

104. In every case of an application to the Court to approve of a composition or scheme, the Report of the Official Assignee shall be filed with the Chief Clerk not less than three days before the day fixed for the hearing of the application.

105. On the hearing of any application to the Court to approve of a composition or scheme, the Court may, in addition to considering the Report of the Official Assignee, hear the Official Assignee thereon.

106. No costs incurred by an insolvent or incidental to an application to approve of a composition or scheme, shall be allowed out of the estate if the Court refuses to approve the composition or scheme.

107. The Court before approving of a composition or scheme shall, in addition to investigating the other matters as required by the Act, require proof that the provisions of Section 28, Sub-sections (1) and (2) of the Act have been complied with. An order approving of a composition or scheme shall be in the Form No. 41, in Appendix I hereto, with such variations as circumstances may require.

108. Where a composition or scheme has been duly accepted by the creditors, such composition or scheme shall not be approved by the Court unless the Court is satisfied on the report of the Official Assignee that provision is made for payment of all proper costs, charges and

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Bombay expenses of and incidental to the proceedings and all fees, commission and percentages to the Official Assignee and the Chief Clerk under the scale of fees, commission and percentages in force for the time being.

109. At the time a composition or scheme is approved of, the Court may correct or supply any accidental or formal slip, error or omission therein, but no alteration in the substance of the composition or scheme shall be made.

Correction of formal slips, etc.

109A. When a composition or scheme is approved of, the Official Assignee shall, on payment of all proper costs, charges and expenses of and incidental to the proceeding and all fees, commission and percentages payable to the Official Assignee and the Chief Clerk, forthwith put the insolvent (or as the case may be the trustee under the composition or scheme or the other person or persons to whom under the composition or scheme the property of the insolvent is to be assigned) into possession of the insolvent's property. The Court shall also annul the order of adjudication.

Proceedings if scheme approved.

110. In every case of a composition or scheme in which a trustee is not appointed or if appointed, declines to act or becomes incapable of acting or is removed, the Official Assignee shall, unless and until another trustee is appointed by the creditors, be the trustee for the purpose of administering the debtor's property and carrying out the terms of the composition or scheme, as the case may be.

Cases in which the Official Assignee is to be trustee.

111. Where under a composition or scheme a trustee is appointed, he shall after the composition or scheme has been approved by the Court, if the Court think it necessary, give security to the satisfaction of the Court. If the trustee fail to give such security within the time required, he may be removed by the Court.

Security by trustee under composition or scheme.

112. Where a composition or scheme has been approved and default is made in any payment thereunder either by the insolvent or the trustee (if any), no action to enforce such payments shall lie, but the remedy of any person aggrieved shall be by application to the Court.

Default in payment of composition.

113. Where a composition or scheme is annulled, the trustee under the composition or scheme, shall account to the Official Assignee for any money or property of the insolvent which has come to his hands, and pay over to the Official Assignee any money or property which has not been duly administered.

Annulment of composition or scheme.

114. Where under any composition or scheme provision is made for the payment of any moneys to creditors entitled thereto and any claim, in respect of which a proof has been lodged, is disputed, the Court may, if it shall think fit, direct that the amount which would be payable on such claim if established shall be secured in such manner as the Court may direct, until the determination of the claim so disputed; and on the determination thereof, the sum so secured shall be paid as the Court may direct.

Disputed claims under composition, or scheme.

115. Every person claiming to be a creditor under any composition or scheme who has not proved the debt before the approval of such composition or scheme, shall lodge his proof with the trustee thereunder, if any, or if there is no such trustee, with the Official Assignee who shall admit or reject the same. And no creditor shall be entitled to

Proof of debts in composition or scheme.

enforce payment of any part of the sums payable under a composition or scheme unless **Bombay** and until he has proved his debt.

Proof of Debts.

Form of Proof. 116. A creditor's proof shall be in the Form No. 45 in Appendix I hereto, with such variations as circumstances may require.

Workmen's wages. 117. In any case in which it shall appear from the insolvent's schedule that there are numerous claims for wages by workmen and others employed by the insolvent, it shall be sufficient if one proof for all such claims is made either by the insolvent or his foreman or some other person on behalf of all such creditors. Such proof shall be in the Form No. 46 in Appendix I hereto, and shall have annexed thereto a schedule setting forth the names of the workmen and others and the amounts severally due to them. Any proof made in compliance with this Rule shall have the same effect as if separate proofs had been made by each of the said workmen and others but shall be stamped with one stamp as an ordinary proof.

Procedure where creditor appeals. 118. The Official Assignee shall, within two days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file such proof with the Chief Clerk, with a memorandum thereon of his disallowance thereof. After the appeal has been heard by the Court the proof, unless wholly disallowed, shall be given back to the Official Assignee.

Time for admission or rejection of proofs by Official Assignee. 119. Subject to the power of the Court to extend the time, the Official Assignee shall, within *seventy* days after receiving a proof in writing, either admit or reject it wholly or in part, or require further evidence in support thereof, and give notice of his decision rejecting a proof wholly or in part to the creditor affected thereby: *Provided that where the assets in any estate are not sufficient to declare and distribute a Dividend the Official Assignee need not examine such proof until sufficient assets are realised:* *Provided also that where the Official Assignee has given notice of his intention to declare a dividend, he shall, within seven days after the date mentioned in such notice as the latest day up to which proofs must be lodged, examine and in writing admit or reject every proof which has not been already admitted or rejected.*

Notice of admission of proof. 120. Where a creditor's proof has been admitted, the notice of dividend shall be sufficient notification to such creditor of such admission.

Costs of appeal from decisions as to proofs. 121. The Official Assignee shall, in no case, be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part.

Dividends.

Notice of intended dividend. 122. Not more than two months before declaring a dividend, the Official Assignee shall cause notice of his intention to do so to be published twice in the local Official Gazette in the English and one vernacular language and in one English and one vernacular daily paper, and at the same time, shall give notice to such of the creditors mentioned in the insolvent's schedule as have not proved their debts. Such notice shall specify the latest date up to which proofs must be lodged which shall not be less than fourteen days from the date of such notice.

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(2) Where any creditor after the date mentioned in the notice of intention to declare a dividend as the latest date upon which proofs may be lodged, appeals against the decision of the Official Assignee rejecting a proof, such appeal shall, subject to the power of the Court to extend the time in special cases, be commenced and notice thereof shall be given to the Official Assignee within seven days from the date of the decision against which the appeal is made, and the Official Assignee shall, in such case, make provision for the dividend upon such proof and the probable costs of such appeal in the event of the proof being admitted. When no appeal has been commenced within the time specified in this Rule, the Official Assignee shall exclude all proofs which have been rejected from participation in the dividend.

(3) Immediately after the expiration of the time fixed by this Rule for appealing against the decision of the Official Assignee he shall proceed to declare a dividend and shall cause notice of the same to be published in the local Official Gazette and in one English and one vernacular daily paper and shall also send a notice of dividend to each creditor whose proof has been admitted, accompanied, if required, by any creditor, by a statement as to the particulars of the estate.

(4) The notices shall be in the Forms Nos. 81, 82 and 83 in Appendix I hereto, with such variations as circumstances may require.

(5) If it becomes necessary, in the opinion of the Official Assignee and the Committee of Inspection (if any) to postpone the declaration of the dividend beyond the prescribed limit of two months, the Official Assignee shall give a fresh notice of his intention to declare a dividend by advertisement in the Gazette, but it shall not be necessary for the Official Assignee to give fresh notice to such of the creditors mentioned in the Insolvent's Schedule of affairs as have not proved their debts. In all other respects the same procedure shall follow the fresh notice as would have followed the original notice.

123. Subject to the power of the Court in any other case on special grounds to order production to be dispensed with, every bill of exchange, Production of bills, notes, &c. hoondie, promissory note or other negotiable instrument of security upon which proof has been made, shall be exhibited to the Official Assignee before payment of dividend thereon, and the amount of dividend paid shall be indorsed on the instrument.

124. The Official Assignee shall pay interest at the rate of 6 per cent. on any dividend ordered to be paid by him under the provision of section 74 of the Act.

Discharge.

125. An insolvent intending to apply for his discharge under section 38 of the Act shall produce to the Chief Clerk a certificate from the Official Assignee specifying the number of his creditors of whom the Official Assignee has notice (whether they have proved or not). Application. The Chief Clerk shall not less than twenty-eight days before the day appointed for hearing the application give notice of the time and place of the hearing of the application to the Official Assignee and shall cause such notice to be published, once in the local Official Gazette, and once in one English and one vernacular paper and shall also send such notice to each creditor not less than one month before the day so appointed. Such notices shall be in the Forms Nos. 31 and 32, in Appendix I hereto.

126. In every case of an application by an insolvent for his discharge, the report of the Official Assignee shall be filed with the Chief Clerk not less than ten days before the time fixed for the hearing of the application. Report of Official Assignee.

127. Where an insolvent intends to dispute any statement with regard to his conduct and affairs contained in the Official Assignee's report, he shall, not less than two days before the hearing of the application for discharge, give notice in writing to the Official Assignee specifying the statements in the report, if any, which he proposes at the hearing to dispute. Any creditor who intends to oppose the discharge of an insolvent on grounds other than those mentioned in the Official Assignee's report, shall give notice of the intended opposition, stating the grounds thereof, to the Chief Clerk, and the same shall be served on the insolvent not less than five days before the hearing of the application.

Costs of application. 128. An insolvent shall not be entitled to have any of the costs of and incidental to his application for his discharge allowed to him out of his estate.

129. (1) Where the Court grants an order of discharge conditionally upon the insolvent consenting to judgment being entered against him by the Official Assignee for the balance or the part of any balance of the debts provable in insolvency which is not satisfied at the date of the discharge, the order of discharge shall not be signed, completed or delivered out until the insolvent has given the required consent in the Form No. 38, in Appendix I hereto. The judgment shall be in the Form No. 39, in Appendix I hereto, with such variations as circumstances may require.

(2) If the insolvent does not give the required consent within 28 days of the making of the conditional order, the Court may on the application of the Official Assignee revoke the order or make such other order as the Court may think fit.

130. The order of the Court made on an application for discharge shall be dated of the day on which the order is drawn up and signed; but such order shall not be delivered out or gazetted until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the Appellate Court thereon. The order shall be in one of the Forms Nos. 33, 34, 35, 36 and 37, in Appendix I hereto, with such variations as the case may require.

Gazetting order. 131. When the time for appeal has expired, or, as the case may be, when the appeal has been decided by the Court, the Chief Clerk shall cause the order to be gazetted.

132. (1) An application by the Official Assignee for leave to issue execution on a judgment entered pursuant to a conditional order of discharge shall be in writing, and shall state shortly the grounds on which it is made. When the application is lodged, the Chief Clerk shall fix a day for the hearing.

(2) The Official Assignee shall give notice of the application to the debtor not less than eight days before the day appointed for the hearing, and shall, at the same time, furnish him with a copy of the application.

133. Where an insolvent is discharged subject to the condition that judgment shall be entered against him, or subject to, any other condition as to his future earnings or after-acquired property, it shall be his duty until such judgment or condition is satisfied, from time to time, to give the Official Assignee such information as he may require with respect to his earnings and after-acquired property and income, and not less than once

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Bombay a year to file with the Chief Clerk a statement showing the particulars of any property or income he may have acquired subsequent to his discharge.

134. Any statement of after-acquired property or income filed by an insolvent whose discharge has been granted subject to conditions shall be verified by affidavit and the Official Assignee may require the insolvent to attend before the Court to be examined on oath with reference to the statements contained in such affidavit or as to his earnings, income, after-acquired property or dealings. Where an insolvent neglects to file such affidavit or to attend the Court for examination when required so to do, or properly to answer all such questions as the Court may put or allow to be put to him, the Court may, on the application of the Official Assignee, rescind the order of discharge. The affidavit shall be in the Form No. 40 in Appendix I hereto, with such variation as circumstances may require.

135. An insolvent shall give fourteen days' notice to the Official Assignee and to all his creditors of the day fixed for the hearing of any application to be made to the Court under Section 42, Sub-Section (2) of the Act.

136. Where an insolvent does not apply to the Court for his discharge under Section 38 of the Act for a period of eighteen months from the date of the order of adjudication, the Court, on the application of the Official Assignee or of a creditor or of its own motion, may annul the adjudication or make such order as it may think fit.

137. The Chief Clerk shall fix a day for the hearing of any application to be made to the Court by the Official Assignee or by a creditor under Rule 136 and notice of the intended application shall be given to the insolvent and also published in the local Official Gazette fourteen days before the day so fixed.

138. A similar notice shall be given and published when the Court desires to proceed of its own motion under Rule 136.

139. Where the Court refuses the discharge of an insolvent, it shall not permit him to renew his application until the expiry of two years from the date of such refusal.

140. Where an insolvent is permitted to renew his application for discharge, the Court shall fix a day for the hearing of such renewed application and the Chief Clerk shall give notice to the Official Assignee and to all his creditors of the time and place of the hearing of the application, not less than fourteen days before the day fixed.

141. The Official Assignee may, if he so wishes, file a further report regarding the conduct and affairs of the insolvent and any creditor may appear and oppose such renewed application as aforesaid.

142. The provisions of Rules 126 and 127 shall apply to such further report of the Official Assignee and to such opposition by any creditor.

Proxies and Voting Letters.

143. (1) A general proxy shall be in Form No. 48, a special proxy in Form No. 49, in Appendix I hereto.

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(2) A proxy shall be lodged with the Official Assignee not later than four o'clock on the day before the meeting or adjourned meeting, at which it is to be used.

(3) As soon as a proxy or voting letter has been used it shall be filed with the proceedings in the matter.

144. A proxy given by a creditor shall be deemed to be sufficiently executed if it is signed by any person in the employ of the creditor having a general authority to sign for such creditor or by the authorized agent for such creditor if resident abroad. Such authority shall be in writing, and shall be produced to the Official Assignee if required;

145. The proxy of a creditor blind or incapable of writing in the English language may be accepted if such creditor has attached his signature or mark thereto in the presence of a witness, who shall add to his signature is description and residence; and provided that all insertions in the proxy are in the handwriting of the witness, and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark.

146. No person shall be appointed a general or special proxy who is a minor.

Meetings of Creditors.

147. Notice to an insolvent and to creditors of a meeting of creditors shall be in one of the Forms Nos. 56 and 65, in Appendix I hereto, with such variations as circumstances may require.

148. The Official Assignee shall send to the Chief Clerk a copy certified by him of every resolution of a meeting of creditors.

149. A meeting of creditors shall not be competent to act for any purpose except the proving of debts and the adjournment of the meeting, unless there are present or represented thereat at least three creditors or all the creditors if their number does not exceed three, but only those creditors who are entitled to vote at the meeting shall be reckoned.

Proceedings by Company or Co-partnership.

150. An insolvency petition against any debtor to any company duly authorised to sue and be sued in the name of a public officer or agent of such company, may be presented by or sued out by such public officer or agent as the nominal petitioner for and on behalf of such company or co-partnership, on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorised to present or sue out such petition.

Proceedings by or against a Firm.

151. Where any notice, declaration, petition or other document is signed by a firm of creditors or debtors in the firm name the partner signing for the firm shall add also his own signature, e.g., "Brown & Co. by James Green, a partner in the said firm."

152. (1) Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served upon any one or more of the partners or at the principal place at which the partnership business is carried on within

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Bombay British India, upon any person having at the time of service the control or management of the partnership business there; and such service shall be deemed good service upon the firm whether all or any of the partners are within or without British India.

(2) Where a notice or petition to or against a firm is served in the manner provided by sub-rule (1) every person upon whom it is served shall be informed by notice in writing given at the time of such service whether he is served as a partner or as a person having the control, or management of the partnership business, or in both characters, and in default of such notice, the person served shall be deemed to be served as a partner.

153. Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name, it shall be accompanied by an affidavit made by the partner signing the petition, showing that all the partners concur in the filing of the same.

154. (1) An order of adjudication made against a firm shall operate as if it were an order of adjudication made against each of the persons who at the date of the order is a partner in that firm.

(2) Subsequent proceedings shall continue in the name of the firm so far as is practicable, but applications for discharge must be made by the partners individually.

155. In cases of partnership the insolvents shall submit a schedule of their partnership affairs and each insolvent shall submit a schedule of his separate affairs.

Joint and Separate Estates.

156. The joint creditors and each set of separate creditors may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

157. Where proposals for compositions or schemes of arrangement are made by a firm and by the partners therein individually, the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors, and the proposals made to each set of separate creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved the order of adjudication shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

158. If any two or more of the members of a firm constitute a separate and independent firm, the creditors of such last mentioned firm shall be deemed to be a separate set of creditors and to be on the same footing as the separate creditors of any individual members of the firm. And where any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Lunatics.

159. (1) Where it appears to the Court that any debtor or creditor or other person who may be affected by any proceeding under the Act or these Rules is a lunatic, not so found by inquisition (hereinafter called the lunatic), the Court may appoint such person as it may think fit to appear for, represent, or act for, and in the name of the lunatic, either generally, or in and for the purpose of any particular application or proceeding, or the exercise of any particular rights or powers which under the Act and these Rules the lunatic might have exercised if he had been of sound mind. The appointment may be made by the Court either on an application made as hereinafter mentioned, or, if the Court thinks fit to do so, without any previous application.

Lunatics.

(2) An application to the Court to make an appointment under this Rule may be made by any person who has been appointed by any Court having jurisdiction so to do, to manage the affairs or property of, or to represent the lunatic, or by any relative or friend of the lunatic who may appear to the Court to be a proper person to make the application, or by the Official Assignee.

(3) The application may be made *ex parte* and without notice, but in any case in which the Court shall think it desirable, the Court may require such notice of the application as it shall think necessary to be given to the Official Assignee or to the petitioning creditor, or to the person alleged to be a lunatic, or to any other person, and for that purpose may adjourn the hearing of the application.

(4) Where the application is made by some person other than the Official Assignee, it shall be supported by an affidavit of a duly qualified medical practitioner as to the physical and mental condition of the lunatic. When the application is made by the Official Assignee, it must be supported by a report of the Official Assignee, the contents of which shall be received as *prima facie* evidence of the facts therein stated.

(5) When a person has been appointed under this Rule, any notice under the Act and these Rules, served on, or given to, such person, shall have the same effect as if the notice had been served on or given to the lunatic.

Small Insolvencies.

160. An application by the Official Assignee that the estate of an insolvent may be ordered to be administered in a summary manner shall be in the Form No. 21, in Appendix I hereto, with such variations as circumstances may require.

Form of application.

160A. Where an estate is ordered to be administered in a summary manner under Section 106 of the Act the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely:—

Summary administration.

- (1) There shall be no advertisement of any proceedings in a local paper unless the Court otherwise directs.
- (2) The title of every document in the proceedings subsequent to the making of the order for summary administration shall have inserted thereon "Summary Case."
- (3) There shall be no Committee of Inspection.
- (4) On an application by an insolvent for his discharge the certificate of the Official Assignee shall not include, nor shall notices be sent to, creditors whose debts do not exceed Rs. 30.

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(5) Notices of meetings or of sittings of the Court shall only be sent to creditors whose debts or claims exceed Rs. 30.

(6) Such sheets from A to H in Form 23 in Appendix I hereto, as will have to be returned blank shall be omitted from the Schedule, the insolvent enumerating such sheets in the deficiency statement.

Administration of estate of person dying insolvent.

161. A creditor's petition under Section 108 of the Act shall be in the Form No. 4, in Appendix I hereto, with such variations as circumstances may require, and shall be verified by affidavit.
Form of petition.

162. Where an administration order under Section 108 of the Act is made, such order shall be gazetted and advertised in the same manner in all respect as an order of adjudication is gazetted and advertised.
Gazetting and advertising.

163. (1) The petition shall, unless the Court otherwise directs, be served on each executor who has proved the will or as the case may be on each person who has taken out letters of administration or if no probate or letters of administration have been granted, upon such person or persons as the Court may direct.
Service.

(2) Service shall be proved in the same way as is provided in the case of an ordinary creditor's petition, and the petition shall be heard in like manner.

164. An administration order under Section 108 of the Act shall be in one of the Forms Nos. 20 and 20A in Appendix I hereto, as the case may be, with such variations as circumstances may require.
Form of order.

165. Where an administration order under Section 108 of the Act has been made, it shall be the duty of the legal representative of the deceased debtor to lodge with the Official Assignee forthwith in duplicate an account of the dealings with and administration of (if any), the deceased's estate by such legal representative, and such legal representative shall also furnish forthwith in duplicate a list of the creditors and a statement of the assets and liabilities, and such other particulars of the affairs of the deceased as may be required by the Official Assignee. Every account, list and statement to be made under the Rule shall be verified by affidavit. The expense of preparing, making, verifying and lodging any account, list and statement under this Rule shall, after being taxed, be allowed out of the estate.
Duties of legal representative.

166. In any case in which an administration order under Section 108 of the Act has been made, and it appears to the Court, on the report of the Official Assignee, that neither probate nor letters of administration to the estate of the deceased debtor have been granted to any person, the account, list and statement mentioned in Rule 165 shall be made, verified and lodged by such person as in the opinion of the Court upon such report may have taken upon himself the administration of or may have otherwise intermeddled with the property of the deceased or any part thereof.
Executor de son tort.

167. In proceedings under an order for the administration of the estate of a person dying insolvent :—
Rules as to administration of estate.

(1) The provisions of Schedule I. of the Act relating to meetings of creditors ;

(2) The provisions of these Rules which refer to creditors, meetings of creditors and Committees of Inspection ; and

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(3) Where the property is not likely to exceed Rs. 3,000 the provisions of Section 106 of the Act shall, as far as applicable, apply as if the proceedings were under an order of adjudication.

Gazetting.

Gazetting notices.

168. All notices requiring publication in the Government of India Gazette or the local Official Gazette shall be gazetted by the Chief Clerk.

Inspection.

Chief Clerk and Official Assignee to give inspection and copies when required.

169. The Chief Clerk and the Official Assignee shall, on the reasonable request of any insolvent or creditor, permit him to inspect and examine every petition, schedule, order of adjudication and all other proceedings relating to such insolvent, and all books, papers and writings filed or deposited in such matter; and shall provide any such insolvent or creditor requiring the same on the receipt of the prescribed fee with a copy or copies of such petition, schedule, order of adjudication and all other orders and proceedings so filed or deposited as aforesaid, or such part or parts thereof as shall be required.

Security of Official Assignee.

Official Assignee to enter into a bond.

170. The Official Assignee, previous to his admission, shall enter into a bond, with sufficient securities to the Commissioner for taking Accounts in the penalty of rupees twenty thousand, conditioned for the due execution of his office.

Accounts and Audits.

Official Assignee to open an account in the Bank of Bombay.

171. The Official Assignee shall open an account with the Bank of Bombay entitled "The Account of the Official Assignee of Bombay," and, all moneys received by him in the realisation of insolvent's estates, shall, after deducting such sum as may be required for immediate payment of costs, charges, etc., within seven days after the receipt thereof, be paid into the credit of the said account.

New Investments.

172. The Official Assignee shall invest all sums to the credit of insolvents' estates as may not be required for the payment of costs, expenses or dividends, in the purchase of 3½ per cent. Promissory Notes of the Government of India and deposit such Notes with the said Bank to the credit of each estate respectively at the expiration of each half year ending on the 31st January and 31st July, respectively.

Official Assignee to keep accurate accounts.

173. The Official Assignee shall keep accurate accounts of the property, debts and credits of every insolvent and of all moneys received and payments made, which accounts any creditor shall be at liberty to inspect at all reasonable times.

Official Assignee to prepare half-yearly an account of each estate.

174. At the expiration of each half year as aforesaid, the Official Assignee shall prepare a statement of account of each estate not then wound up and fully distributed, that is to say, of the whole receipts, of the whole disbursements (distinguishing dividends from other payments), of the balance remaining, and of the mode in and securities on which the balance is actually invested, and at the foot thereof shall specify the amount of commission received by him during the half year.

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175. The Chief Justice shall from time to time appoint an Auditor or Auditors to examine half-yearly, up to the 31st day of January and the 31st day of the July in every year, the statement which the Official Assignee is required to prepare under Rule 174.

176. The Auditor or Auditors so appointed shall examine the said statement and the accounts of the Official Assignee and shall report thereon to the Chief Justice; and if during such audit any question or matter of difference shall arise between the Auditor or Auditors and the Official Assignee in respect of any payment, receipt, voucher or otherwise, such question or matter of difference shall be referred to the Chief Justice or to such Judge as he may appoint to decide the same.

177. On completion of each audit, the statement above referred to shall be signed by the Auditor or Auditors and by the Official Assignee, and shall be published forthwith in the local Official Gazette.

178. The Official Assignee shall open an account called "The Unclaimed Dividend Account" and shall from time to time transfer to the said account all dividends unclaimed within one year from the date of declaration of such dividends together with all sums standing to the credit of insolvents' estates in which no further recovery is anticipated and in which no dividend can be declared, and all such other unclaimed balances whatsoever as may be in his hands by virtue of proceedings under the Indian Insolvency Act, 1848, or any other previous Insolvency Act, and invest all moneys standing to the credit of the account in Promissory Notes of the Government of India bearing interest at 3½ per cent. or any higher rate.

179. The Official Assignee shall transfer the interest arising from such investment to an account called "The Unclaimed Dividend Revenue Account" and from the moneys at credit with such account shall pay such fee not exceeding Rs. 1,500 for each audit as the Chief Justice shall consider reasonable together with such sums for stationery, wages and other office expenses as the Chief Justice may direct.

179A. If in any year after the 31st January it should be found that there was an excess of income over expenditure during the previous twelve months in the Unclaimed Dividend Revenue Account, the Chief Justice may in his discretion direct the payment to Government of such balance or any part thereof.

180. The Official Assignee shall be entitled to charge for the duties to be performed by him:—

(a) Such fees and percentages as may be chargeable by him under the Act and these rules.

(b) A commission of 5 per cent. on the principal amount or value of the assets collected by him in each estate and a commission of 1 per cent. on the value of assets taken charge of or collected by him as Interim Receiver and a commission of 3 per cent. on the amount paid in pursuance of a Composition or Scheme of arrangement and when an application is made under section 21 of the Act on the ground that the debts of the Insolvent are paid in full, a commission of 3 per cent. on the total of such debts (the same to be payable before any order is made under this section).

Provided that if after any half-yearly audit it shall appear that the amount of such commission shall not have reached the average of the time scale of Rs. 2,500-50-2,750 the commission shall be made up to this amount by taking the sum required from the "Unclaimed Dividend Revenue Account."

The Official Assignee shall be paid on the time scale of Rs. 2,500-50-2,750, the excess of fees and commission over the Official Assignee's pay levied in any one year from the 1st February to the 31st of January following being applied in the first instance towards the payments to the Official Assignee's Establishment Provident Fund of a sum equal to the aggregate pay for one month of all the members of his establishment who are members of the said Provident Fund, and the balance, if any, thereafter being credited to Government.

- (c) A commission not exceeding 5 per cent. on the amount realized by the Official Assignee under the 2nd Schedule to the Act, as may by agreement be fixed between the Official Assignee and the Mortgagees.

The Prosecution of Fraudulent Debtors and the Payment of the Costs thereof.

181. At the hearing of any notice or of any charge under Section 104 of the Act, the Court may direct that the Official Assignee shall have the conduct of the proceedings against the insolvent and thereupon the Official Assignee shall be entitled to pay the costs and expenses of such proceedings out of the "Unclaimed Dividend Revenue Account."
- Prosecution of fraudulent debtors and payment of costs thereof.

Costs of Civil Proceedings.

182. Where the Official Assignee has been directed by the Court in the matter of any insolvency to institute legal proceedings of any kind whatsoever he shall be entitled, so far as the assets in his hands relating to such insolvency are insufficient to meet the costs and expenses of such proceedings, to pay such deficiency out of the "Unclaimed Dividend Revenue Account."
- Costs of civil proceedings.

183. Where the Official Assignee, while acting under the order and direction of the Court in the matter of any insolvency, shall incur any civil liability and the assets in his hands relating to such insolvency are insufficient to meet such liability, he shall be entitled to apply to the Court for leave to pay any deficiency out of the "Unclaimed Dividend Revenue Account" and such leave shall be granted provided that the Official Assignee while so acting shall have complied with the order and direction of the Court.
- Civil liability of Official Assignee how met.

- 183A. Where an insolvent has no available assets, the Official Assignee shall not be required to incur any costs, charges or expenses in relation to his estate without the express directions of the Court. Provided that he shall be at liberty to apply any moneys not exceeding Rs. 250 in any one matter out of the revenue of the moneys standing to the credit of "The Unclaimed Dividend Account" in defraying any necessary Court fees, costs, charges and expenses in administering estates in which he has no funds in his hands and shall repay, in priority to all other claims or charges he amount so applied, out of the recoveries, if any, made by him.
- Costs when assets not available.

Committee of Inspection.

184. (1) A Committee of Inspection shall consist of not more than five nor less than three persons.
- Committee of Inspection.

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(2) A Committee of Inspection shall meet at such time as they shall from time to time appoint and failing such appointment at least once a month; and the Official Assignee or any member of the Committee may also call a meeting of the Committee as and when he thinks necessary.

(3) A Committee of Inspection may act by a majority of its members present at a meeting, but shall not act unless a majority of the Committee is present at the meeting.

(4) Any member of a Committee of Inspection may resign his office by notice in writing signed by him and delivered to the Official Assignee.

(5) If a member of a Committee of Inspection becomes insolvent or is absent from five consecutive meetings of the Committee, his office shall thereupon become vacant.

(6) If a creditor who has not proved is appointed a member of a Committee of Inspection, his office shall become vacant if he does not prove within one month from the date of his appointment.

(7) Any member of a Committee of Inspection may be removed by a resolution at any meeting of the creditors, of which seven days' notice has been given, stating the object of the meeting.

(8) On a vacancy occurring in the office of a member of a Committee of Inspection, the Official Assignee shall forthwith summon a meeting of creditors for the purpose of filling the vacancy and the meeting may by resolution appoint another creditor or other person eligible as above to fill the vacancy.

(9) The continuing members of a Committee of Inspection, provided there be not less than two such continuing members, may act notwithstanding any vacancy in their body, and when the number of members of a Committee of Inspection is for the time being less than five, the creditors may increase that number so that it does not exceed five.

185. Where a Committee of Inspection has been appointed under Section 88 of the Act, the Official Assignee shall, in the administration of the property of the insolvent and in the distribution thereof, have regard to any directions that may be given by the Committee, but any directions given by resolution of the creditors at a meeting shall in case of conflict override any directions given by the Committee.

Consent to be
obtained by Official
Assignee before
applying to Court
under Section 68.

186. Where a Committee of Inspection has been appointed under Section 88 of the Act, the Official Assignee shall obtain the consent of the Committee before applying to the Court for leave to do any of the things for which such leave is required by Section 68 of the Act.

Disclaimer of Lease.

Disclaimer of Lease.

187. (1) A lease may be disclaimed without the leave of the Court in any of the following cases, viz. :—

i. Where the insolvent has not sublet the premises leased or any part thereof or created a mortgage or charge upon the lease and

(a) The rent reserved is less than Rs. 300 per annum, or

(b) The estate is administered under the provisions of Section 106 of the Act, or

(c) The Official Assignee serves the lessor with notice of his intention to disclaim and the lessor does not, within seven days after the receipt of such notice, give notice to the Official Assignee requiring the matter to be brought before the Court.

- ii. Where the insolvent has sub-let the demised premises or created a mortgage or charge upon the lease and the Official Assignee serves the lessor and the sub-lessee or mortgagee with notice of his intention to disclaim and neither the lessor nor the sub-lessee or mortgagee or any of them, within fourteen days after the receipt of such notice, require the matter to be brought before the Court.

(2) The notices shall be one of the Forms Nos. 72, 73, 74, 78, 79 and 80 in Appendix I hereto, with such variations as circumstances may require.

(3) Except as provided by this Rule, the disclaimer of a lease without the leave of the Court shall be void.

(4) Where the Official Assignee disclaims a lease he shall forthwith file the disclaimer with the Chief Clerk, and the disclaimer shall contain particulars of the lease disclaimed and a statement of the persons to whom notice of the disclaimer has been given. Until the disclaimer is filed by the Official Assignee it shall be inoperative.

(5) Where in pursuance of a notice by the Official Assignee to disclaim a lease, the lessor, sub-lessee or mortgagee requires the Official Assignee to apply to the Court for leave to disclaim, the costs of the lessor, sub-lessee or mortgagee shall not be allowed out of the estate of the insolvent except in cases in which the Court is satisfied that such application was necessary in order to do justice between the parties.

(6) A disclaimer made without the leave of the Court under this Rule shall not be void or otherwise affected on the ground only that the notice required by this Rule has not been given to some person who claims to be interested in the property leased.

(7) Where any person claims to be interested in any part of the property of the insolvent burdened with onerous covenants, he shall, at the request of the Official Assignee, furnish a statement of the interest so claimed by him.

Official Assignee.

188. (1) As soon as the Official Assignee receives notice of an order of adjudication, the or some one deputed by him shall forthwith hold a personal interview with the insolvent for the purpose of investigating his affairs and determining whether the estate should be administered under Section 106 of the Act.

(2) It shall be the duty of the insolvent to attend at such time and place as the Official Assignee may appoint.

189. Application by the Official Assignee to the Court may be made personally and without notice or other formality; but the Court may in any case order that an application be renewed in a formal manner, and that such notice thereof be given to any person likely to be affected thereby as the Court may direct.

190. Where for the purposes of any application to the Court by the Official Assignee for directions or for leave to disclaim a lease, or for an extension of time to apply for leave to disclaim a lease, or for an order to commit an insolvent, it is necessary that evidence be given by him in support of such application, such evidence may be given by a report of the Official Assignee to the Court and need not be given by affidavit, and any such report of the Official Assignee to the Court shall be received by the Court as *prima facie* evidence of the matters reported upon.

191. In any case of doubt or difficulty or in any matter not provided for by the Application or Act or these Rules relating to any proceedings in Court, the Official Assignee may apply to the Court for directions.

Rules—P. A. I. A.**Bombay****Accounting by Official Assignee.**

192. Where a composition or scheme is sanctioned by the Court the Official Assignee shall account to the debtor or as the case may be to the trustee under the composition or scheme.

193. The insolvent shall, on the request of the Official Assignee, furnish him with trading account of insolvent. for a period not exceeding two years prior to the date of the order of adjudication as the Official Assignee may require. Provided that the insolvent shall, if ordered by the Court so to do, furnish such accounts as the Court may order for any longer period. If the insolvent fails to comply with the requirements of this Rule, the Official Assignee shall report such failure to the Court and the Court shall take such action on such report as the Court shall think just.

194. The following provisions shall apply to every case in which proceedings are taken, either by action, motion or in any other manner against the Official Assignee in respect of anything done or default made by him, when acting, or in the *bona-fide* and reasonable belief that he is acting in pursuance of the Act, or in execution of the powers given to the Official Assignee by the Act :—

- (1) Subject to the provisions of the next following sub-section, the costs, damages and expenses which the Official Assignee may have to pay, or to which he may be put under such proceedings, shall be paid out of the estate of the insolvent.
- (2) As soon as any such proceedings are commenced it shall be the duty of the Official Assignee to report the same to the Court, which shall determine whether or not such proceedings shall be resisted or defended, and unless the Court shall otherwise determine, no such costs, damages or expenses shall be paid out of the estate unless the Court has determined that such proceedings shall be resisted or defended.
- (3) The Official Assignee shall not, unless the Court shall otherwise order, be entitled to be paid out of the estate any costs or expenses he may have to pay or bear in consequence of resisting or defending any such proceedings unless the Court has determined that such proceedings shall be resisted or defended.

Miscellaneous.

195. Every Special Manager shall account to the Official Assignee and every such Special Manager's accounts shall be verified by affidavit and when approved by the Official Assignee the totals of the receipts and payments shall be added to the Official Assignee's accounts.

Accounts of Special Manager.

196. (1) Any person who knowingly falsifies or fraudulently alters any book or document in or incidental to any proceeding under the Act or these Rules shall be deemed to be guilty of contempt of Court and shall be liable to be punished accordingly.

Falsification of documents.

(2) The penalty imposed by this Rule shall be in addition to and not in substitution for any other penalty, punishment or proceeding to which such person may be liable.

197. Non-compliance with any of these Rules or with any Rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

Non-compliance with Rules.

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198. All Rules and Orders made under the Indian Insolvency Act, 1848, are hereby annulled, except so far as regards any proceedings under the said Act, which may be pending in the Court at the date of coming into operation of these Rules.

Repeal of Rules under the Act of 1848.

199. When no other provision is made by the Act or these Rules, the present law procedure and practice in Insolvency matters shall, in so far as applicable, remain in force. And save as provided by these Rules, or Rules amending them, the Rules of the High Court of Bombay, 1909, shall not apply to any proceeding in insolvency.

Saving for existing laws, etc.

200. When the Official Assignee is of opinion that an insolvent has been guilty of an offence under Section 103 of the Act, he shall report the same to the Court, whether the insolvent has made an application for his discharge or not, and the Court shall take such action on such report as it may think fit.

Report by Official Assignee relating to offences under Section 103.

201. A notice under Section 104 of the Act shall be served personally on the Insolvent not less than seven days before the day fixed for the hearing of the notice: Provided that in any case in which the Court may think fit the Court may allow substituted service of the notice by advertisement or otherwise or shorten the length of notice to be given.

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